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A DIGEST

OF THE

LAW OF PARTNERSHIP,

WITH AN

INTRODUCTORY ESSAY ON CODIFICATION

BY

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INTRODUCTION.

THE present work was undertaken, in the first place, in order to supply the want of a concise work on the Law of Partnership: and if this were all, it would be needless to say much by way of introduction. But the form I have adopted invites, if it does not demand, some words of explanation; the adoption of it, moreover, commits the writer to certain opinions on matters of much wider range and importance than the subject actually handled. Those opinions are still far from being established, and one who attempts to exemplify them in practice is in some sort thereby bound to set forth his understanding of them, and to bear his part, however slight it may be, in their justification. My desire has been to follow to the best of my power the example set by Mr. Justice Stephen in his 'Digest of the Law of Evidence,' and repeated by him in the yet more weighty and difficult work of a 'Digest of the Criminal Law,' which has since been made the foundation of a Draft Code. This being said, it is almost superfluous to say that I agree with him in thinking the Indian Codes a desirable model for the exposition of English law, by authority if possible, but if and so far as that is too much to hope for, then by private endeavour; and that I likewise agree with the reasons which he has given for that opinion both in the introduction to his 'Digest of the Law of Evidence' and on various other occasions. Some of those reasons, however, I may without

presumption try to restate in my own way, this being a topic on which repetition is certainly not vain in the sense of being needless; and it seems also proper, in addition to this general statement, to explain why the subject of Partnership has appeared to me a specially fit one for an experiment of this kind.

The method of stating the law in general propositions accompanied by specific illustrations was introduced into Indian legislation by Macaulay, though not brought into operation till many years afterwards, and to him the merit of the invention is chiefly if not wholly attributable.[1] It seems to me the greatest specific advance that has been made in modern times in the art called by an ingenious writer "the mechanics of law-making." We should by no means underrate the gradual improvements of detail, the introduction of orderly arrangement and cutting down of prolix and slovenly drafting, which have made recent Acts of Parliament comparatively readable; but Macaulay's invention stands on a different level. It is an instrument of new constructive power, enabling the legislature to combine the good points of statute-law and case-law, such as they have hitherto been, while avoiding almost all their respective drawbacks.

Case-law gives particular instances and concrete analogies, from which general rules may be inferred with more or less exactness, and their application to new instances predicted with more or less certainty; but it does not, strictly speaking, lay down general propositions beyond

[1] Traces of the idea may be found in Bentham. He proposed to give in the body of a Code a running accompaniment of authoritative reasons and explanations, which might have dealt more or less in specific instances; and such instances do occur in the 'Specimen of a Penal Code' (Works, vol. i.). But this amounts at most to a very vague foreshadowing of the Anglo-Indian method. Compare Mr. Whitley Stokes's 'Anglo-Indian Codes,' Oxford, 1887, p. xxiii.

the limits which happen to be determined by the precise facts of each case. Every decided case does within those limits affirm a general proposition, with the help of the fixed understanding by which our Courts are governed, that similar decisions are to be given on similar facts. It involves, namely, the decision of all future cases exactly like it, and also of all such as, though not exactly like it, may be in the opinion of the Court so nearly like it that they ought to follow its analogy. The investigation of the likeness or unlikeness of the facts of different cases for this purpose is often a matter of great difficulty and nicety, and the power of forming a judgment on such questions can be acquired only by legal training and experience. Thus the framework of case-law consists of the statement of a great number of sets of facts, together with the legal results which have been decided to follow from them: the generalities which make it possible to state the law in a connected form are supplied by a process of discussion, inference, and comment carried on partly by the judges themselves in dealing with the cases, partly by private text-writers. The inspection of such a work as Fisher's Digest, or perusal of the reported judgments in any current case in the Court of Appeal, will give in a short time, even to a lay reader, a much better notion of the manner in which English case-law is constructed than can be given by any description. In the result, our English case-law, or any other system developed in substantially the same manner, has the great advantage of being full and detailed, and of preserving the memory of the remedies administered to the practical needs of men's affairs in a record rich in experience and fruitful of suggestions. But there is no security for completeness, and imperfect security for consistency. While in some departments no possible scrap of mint or anise or cummin seems to remain unnoted, in others we may still wait for authority to give a certain

answer on the greater matters of the law; we have decisions of the most elaborate minuteness on the construction of documents, and questions of substantive principle which are both important and elementary remain in an unsettled condition. And the system of graduated authority, an excellent one as far as it goes, which makes the decision of a Court of Appeal binding on all Courts below it, and the decision of the Court of final appeal binding on all other Courts and on itself,[1] does not prevent co-ordinate and conflicting decisions from standing side by side for an indefinite time. Case-law, moreover, is intelligible and accessible only to experts, and to them only with an ex-

[1] Even when a decision is affirmed on appeal by reason only of the House of Lords being equally divided, the decision remains binding on the House of Lords itself in subsequent cases. This happened in the case of *R.* v. *Millis*, 10 Cl. & F. 534, which was afterwards expressly recognized as binding in *Beamish* v. *Beamish*, 9 H. L. C. 274 (see at p. 338): see also *Bright* v. *Hutton*, 3 H. L. C. at pp. 388, 391; *Attorney-General* v. *Dean and Canons of Windsor*, 8 H. L. C. 369, 391; Lord Blackburn in *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 335; and Lord Selborne in *Caledonian Railway Co.* v. *Walker's Trustees*, 7 App. Ca. 275. However, even a Court of ultimate appeal may reconsider questions which the non-appearance of a respondent has formerly compelled it to determine *ex parte*. This was done by the Judicial Committee in the ecclesiastical appeal of *Ridsdale* v. *Clifton*, 2 P. D. at pp. 277, 278, 305—307. It also seems doubtful whether the rule applies to criminal law (but see *R.* v. *Glyde*, 1868, L. R., 1 C. C. R. 139). And the Supreme Court of the United States does not hold itself bound by its own decisions (*The Legal Tender Cases*, 12 Wall. 457, 554, 570). But the peculiar functions of that Court in relation to the federal Constitution have to be taken into account. It is really a political as well as a judicial power. The Court of Appeal in England generally holds itself bound by the decisions of Courts of equal authority (the Court of Appeal itself as existing since the Judicature Acts, the Court of Appeal in Chancery, or the Exchequer Chamber); but it has held itself not bound by the result of a case where the Court was equally divided: *The Vera Cruz* (No. 2), 1884, 9 P. Div. 96. The policy of the course taken by the House of Lords in *Beamish* v. *Beamish* seems open to discussion.

penditure of thought and labour often utterly disproportionate to the end in view.

Statute-law, on the other hand, gives general propositions in definite terms, but is seriously deficient in omitting to give particular instances, which in our present system are wholly left to be filled in afterwards by judicial decision, so far as occasions may present themselves. Nor is it to be supposed that this want exists only in the peculiar circumstances and habits of English or English-born jurisprudence, or is felt only by English lawyers. Such a supposition, if entertained at all, may be corrected by a moderate acquaintance with the Roman commentaries on the Edict, which are partially preserved in the Digest, or still better the various modern editions and expositions of the French Codes. The closely-packed volumes of the 'Codes Annotés' present us, in fact, with a French counterpart of Fisher's Digest; the chief points of contrast being that in the French work the decisions of the Courts and the opinions of text-writers, being of equal importance, are indiscriminately mixed up, and further that, inasmuch as neither decisions nor opinions (however highly esteemed) have any binding authority, and the number of Courts of co-ordinate jurisdiction is far greater than with us, there is apparently no limit whatever to the amount of conflict that may arise. So that, whereas on simple questions the law of France is in general easier to be known than the law of England, yet on a complicated question, which for this purpose means any question on which experts may reasonably differ in their way of construing or supplementing the Code, the law of France must be, as it appears to me, almost infinitely more difficult to ascertain than the law of England, or, strictly speaking, not capable of being definitely ascertained at all. This state of things, it may be said, is in great measure due to carelessness and omis-

sions on the part of the original framers of the Codes, want of subsequent revision, and other causes which the French legislators might and ought to have foreseen. And this, indeed, is the case; nevertheless I think that on a comparison of the 'Codes Annotés' with the Anglo-Indian Acts it is impossible to resist the conclusion that if the French Codes, the text being even as it now is, had been accompanied by a moderate number of authoritative illustrations, an immense amount of discussion and litigation would have been saved. To come back nearer home, one is strongly tempted to consider how great improvements might have been effected in most of our Acts of Parliament, from the Statute of Frauds downwards, by a judicious use of the Anglo-Indian method. It would have diminished, at any rate, the risk of elaborate enactments almost fresh from the Queen's Printers being pronounced, when they came to be applied to existing facts, to be explicable on no other hypothesis than that they were intended to puzzle the Court of Queen's Bench; but this is a topic on which it is hardly safe to enlarge, lest one should unadvisedly speak of the wisdom of the Legislature more lightly than beseems an English citizen and servant of the law. This much, however, I may say, that the style peculiar to parliamentary drafting (though now to a great extent abandoned), which contrives with singular infelicity to be at the same time crabbed and nebulous, may be regarded as the natural fruit of English legal minds working in fetters, scrupulously anxious to cover all the cases which occurred to them, but debarred from distinctly pointing them out; having a specific meaning, but being forbidden to express it in a specific form.

The method of the Indian Codes escapes these evils on both hands by combining the virtues of general enactments with those of specific decisions. The illustrations, being

of equal authority with the text, serve as a commentary to fix its meaning and as a guide in its practical application. It is, likewise, I think, a point of no small importance that by this system the function of case-law is distinctly recognized, and its results may be from time to time embodied in the law itself. In the successive revisions which, as Mr. Justice Stephen has pointed out, are indispensable to keep a Code in efficient working order, not only such defects as experience has shown to exist in the text may be amended, but cases decided since the last revision may be given as fresh illustrations if they are deemed important and instructive enough; or if, on the other hand, any decision has put on the text of the law a construction opposed to the intention of the Legislature, that construction may be expressly negatived in the same form. Here in England the absence of any such provision makes the statute-law yet more unwieldy and obscure than pure case-law, if not actually misleading. Lawyers know, of course, but I doubt if it is commonly known among laymen, that the Revised Statutes do not contain the whole law, nor anything like it, even on those subjects which Parliament has most expressly and, on the face of the Acts, exhaustively dealt with. The law regulating the form to be observed in the sale of more than ten pounds' worth of goods is to be found, apparently, in the 17th section of the Statute of Frauds. But is it really there? Nothing of the kind; most of it is in the accumulated decisions of two centuries on that section, and if we wish to know the present state of things we must go to the text-writers, and thence to the reports to which they refer us. So, even if we take much later instances, the law of publicans' licences consists not of the Licensing Acts, but of the Licensing Acts together with several decisions of the Court of Queen's Bench. The law which determines

the qualifications of voters consists not of the Reform Acts, but of the Reform Acts together with a great number of decisions of the Court of Common Pleas. The Salmon Fishery Acts, of which the first is less than a generation old, are already, in Cromwell's inimitable phrase, an ungodly jumble. If we paid any systematic attention to these matters, we should have a series of annual amending and supplemental Acts to bring the statutes of general public importance, and especially those with which laymen have most to do, such as Acts relating to public health, local government, and the like, into accordance with the real state of the law as settled by the cases decided upon them. This, which of itself would be an improvement of exceeding value, might be effected quite apart from any larger scheme of codification or consolidation; and it might also very well be done, though not so well, without the Anglo-Indian use of illustrations.[1] The complete revision of the Rules of Court in 1883 is an example of the sort of work that we need in many other departments. And the quiet acceptance of this work, really nothing less than the re-casting of a code of civil procedure at the hands of a committee of the judges, goes to show that the difficulties of delegating legislative power under our parliamentary constitution are perhaps not so great after all as we have been wont to think.

Although I am strongly of opinion that the Anglo-Indian Codes furnish us in their general method and design with a pattern which we should do well to follow, it must not be supposed that I hold them to be perfect in

[1] The plan of the New York Commissioners, which was to furnish the text of the Code with simple references to decided cases, seems to me only apt to perpetuate the inconveniences of existing statute-law. The law would still be contained not in the Code, but in the Code and many other books.

execution. They are indeed far better than any other work of the kind that I have seen. It is hardly needful to mention the French Codes, which do not even aim at exactness of drafting, and are perhaps most fairly to be judged by regarding them as concise Institutes. The Commercial and Penal Codes of Germany, and the more recent Swiss Federal Code of Obligations, are much nearer to what codes ought to be, and deserve on many accounts to be studied by English lawyers; still there is to English eyes something unfinished about the workmanship, and in the German Penal Code there is a great deal more of deliberate vagueness than we could now admit. The Italian Codes are modelled on the French,[1] and therefore share their defects, though they have improved on them in details. One serious attempt has been made, elsewhere than in British India, to codify English law: I mean the draft Civil and Penal Codes of the State of New York. These were prepared and published many years ago, and remain unexecuted projects in their own State, where they have led to a chronic controversy; they have been substantially adopted in California, but it is stated that the Californian Courts "go on much as before, citing decisions, even from other States, and basing their judgments upon them." The draftsmen of the New York Penal Code had the Indian Penal Code before them; the framers of the Indian Contract Act, on the other hand, were able to consult the draft Civil Code of New York, and made such use of it as they thought desirable, which in my opinion was far too much. In this case no minute comparison is needed to show the great superiority of the Anglo-Indian work. The weakest parts of the Contract Act are those in which the influence of the New York Code is most apparent. For the rest, that Code in its own birthplace has hitherto

[1] I believe this does not apply to the new Penal Code prepared for the whole kingdom.

failed to become law, notwithstanding the persistent efforts of its promoters. And I feel bound to add that special examination of almost any part of the Code does not tend to remove the prejudice thus engendered. It seldom reads like the work either of good lawyers or of good draftsmen. An ingenious American writer, himself (unlike many of the New York school) an advocate of codification, has said of the New York draft that "as a codification of the existing unwritten law it has almost no value, and this mainly because absolutely necessary details, the very matters that make a good code so much to be desired, are sacrificed to an illusory brevity."[1] The Indian Codes, then, are the best models yet produced; at the same time they are by no means faultless. It is easy to see various points in which they are capable of improvement, though it must be remembered that for the purposes of Indian administration labour and ingenuity would not improbably be thrown away in working them up to the refined exactness which is an English lawyer's ideal. The defects, however, so far from being inseparable from the method, are mostly due to a want of thoroughness in carrying it out in particular instances. Thus one finds that statements of the law have been adopted word for word from English reports or text-books which are open to verbal criticism, or sometimes to more substantial objection; and it is occasionally difficult to see whether it was or was not intended to alter existing English law. This last difficulty may be a practical one even in India (though I understand that in the High Courts there is a rather strong presumption against departing from the English authorities), and it would be very necessary to guard against it in any work of the same kind undertaken for England.

[1] Henry T. Terry, 'The Leading Principles of Anglo-American Law,' Philadelphia, 1884, p. 640.

Questions of the like sort have indeed often arisen in this country when there has been a series of similar statutes dealing with the same or similar topics in the same general manner, but with variations of language. In fine, I look upon the Indian Codes as exhibiting the type of what we should aim at by an example not to be merely copied, but to be followed and improved upon. If we could only determine that this should be done; if English people were once brought to perceive that this work is of national interest and importance, and its omission discreditable to our national intelligence, I believe it would be a quite practicable undertaking, and that within no unreasonable compass of time, to make the laws of England, or so much of them as concerns men's common affairs and duties, as good in form as they now are in substance, and as conspicuous an example of order and clearness as they now are of the contrary.

It is quite possible that exaggerated notions may be entertained in some quarters of the benefits expected by the advocates of codification, and it is not impossible that some of the small number of persons who think codification worth working for do in fact expect too much from it. People who plead for giving a trial to an unfamiliar remedy are always in some danger of proclaiming their remedy as a panacea, and are pretty sure in any case to be accused of it. Now there are evils of hardship, expense, and uncertainty, which are due to the present form of the law, and which codification may abate, and has in fact abated in other countries even under circumstances of disadvantage. But there are other drawbacks and difficulties inherent in the very nature of legal affairs, which codification certainly cannot remove, although it may possibly mitigate them to some extent. Apart from all questions of form and procedure, the complexity and

novelty of men's dealings will always give rise to a certain number of really difficult cases. And I do not see how these are to be prevented under any system from arising or from being difficult. There are cases, like *Dalton* v. *Angus*,[1] which, if not easy in themselves, have their difficulties vastly exaggerated by the formless condition of our authorities. But questions such as had to be decided in *Charter* v. *Charter*,[2] *Hollins* v. *Fowler*,[3] or *Robinson* v. *Mollett*,[4] must be hard to deal with even if we had the best of possible codes. The skilled imagination of the draftsman who devises the illustrations may anticipate many future cases, but it cannot be all-exhaustive. There is no magic in the name or form of a code to make the legislator's foresight consummate. A good code, however, would do this: it would enable one to discover with infinitely less trouble than at present whether a given case were really difficult or not. Our present system has made easy cases difficult by throwing difficulties in the way of this preliminary inquiry. An English layman is, as a rule, helpless before the simplest legal question: he has to go to a lawyer to be told that it is simple. An English lawyer can see at once that some questions are simple; as to others he can generally make a fair guess, by a sort of trained instinct, whether there is anything serious in them, but he may have to spend a good deal of time in research before he can be sure even of this. And this kind of trouble and uncertainty, which often gives a factitious importance to matters that are small in themselves, would be vastly diminished, if not altogether removed, by any systematic arrangement of the law.

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[1] 6 App. Ca. 740.
[2] L. R. 7 H. L. 364.
[3] *Ib.* 757.
[4] *Ib.* 802.

So then, an objector may say, codification is to make easy cases easier, and leave the difficult ones as they are; but is that after all worth doing? Assuming for argument's sake that the objection may be fairly stated in this form, the reply is that easy cases are beyond comparison the more numerous in practice. The solid business of justice consists in giving effect to plain and settled rights, and the first thing to be secured is that such rights may be readily ascertained and speedily enforced. If this is thoroughly accomplished the doubtful ones will almost take care of themselves. Men's attention is fixed on the one curious or difficult case—and this is true of the public as well as of lawyers and students—and they forget the ninety and nine which are straightforward, and where no doubt is possible after the facts are ascertained. The consideration here put forward will go far to explain why the French Codes, and codes framed in close imitation of them elsewhere, have notwithstanding all their defects been productive of great benefits in practice.

At the same time it is not altogether true that difficult cases would be left as they are, for a well-planned codification of any important branch of the law would remove many existing occasions of difficulty. Questions which in framing a code it would be impossible to pass over are now unsettled, either because the point has not distinctly arisen or, which is a commoner and more troublesome case, because it has arisen and has been evaded, thus becoming surrounded with uncertain and more or less conflicting dicta. Such questions would have to be dealt with and reduced to certainty one way or another, and a considerable amount of possible dispute would thus be cut short. To this extent codifying would involve substantive legislation; and for this reason I cannot agree with those who speak of codifying the law just as it stands. When one

comes to think what it really means the thing is seen to be impossible. There are parts of the law which, if codified as they stand, would be the laughing-stock of mankind; it is only the obscurity of their present form which enables them to exist at all. It seems to me a distinct advantage to be claimed for codification that it would drag into the light a number of petty anomalies and absurdities (and some, perhaps, that are not petty), and compel us to get rid of them. Parliament could not stultify itself by passing Acts of which several sections declared the law to be doubtful, while others laid down things merely ludicrous. Consider a few simple instances from the law of contract. How would the rule in *Pinnel's Case*[1] look in a code? It would run something like this: "The person entitled to the performance of a contract may . . . accept instead thereof any satisfaction he thinks fit: provided that he cannot accept in satisfaction of any sum of money the payment of any less sum at the same time and place and in the same manner at and in which respectively the original sum was payable." That is, if A. owes B. £100, and B. accepts £75 in money in satisfaction of the whole at the same time and place at which the £100 are payable, A. is not discharged from the remaining £25 without a release under seal; but if A. gives and B. accepts a pair of gloves, a canary, or a peppercorn in satisfaction, the whole debt is

[1] 5 Co. Rep. 117. This rule, which the House of Lords affirmed with reluctance in *Foakes* v. *Beer*, 1884, 9 App. Ca. 605, is not a case of anomaly, but of the extreme application of a principle in circumstances to which it is not appropriate: it applies the doctrine of consideration to the discharge as well as to the formation of contracts without regard to the consequences. It is not strictly fair, therefore, to call it "one of the mysteries of English Common Law" (per Jessel, M.R., 19 Ch. D. 399).

discharged: and if the Indian method were adopted some such instances as these would be given as illustrations. Could this possibly stand? The sale of goods, again, is one of the commonest transactions of life, and default in payment by the buyer is an event by no means unheard of. Yet nobody knows to this day what is the precise extent of an unpaid vendor's rights when he keeps or has resumed possession of the goods. Could Parliament be expected simply to put the doubt on record? Again, the question of contracts made by correspondence could not be satisfactorily disposed of without an exercise of real legislative power. It would be only too easy to multiply examples. Any one who has had much to do with English law can probably call to mind some such curiosities in the subjects with which he is most familiar: in our criminal law there are several, mostly of statutory creation, which are truly amazing. An authentic codification, therefore, would involve amendment; and if a codifying Commission were appointed, it would be necessary to give power to the Commissioners to suggest such changes as they should think indispensable. Ample opportunities should of course be given for the public explanation and discussion of proposed amendments, say, before a select committee: after which they might, if further security were thought desirable, be specially submitted to Parliament, and the Commissioners might be directed by provisional and temporary Acts to embody them in the Code. The draft Criminal Code prepared by Mr. Justice Stephen, and revised by a judicial Commission, has not yet made sufficient progress before Parliament to throw much light on the best way of working out these details. It is past reasonable doubt, however, that the difficulties are matter of detail and can be overcome. It is not material that is wanting, or the means of criticism, or competent workers.

All these are at hand. The things needful are the will to resolve on the undertaking and two or three guiding minds to organize its execution. Meanwhile statements of the law just as it is in a codified form may be good not only for present use, but to call distinct attention to the points where amendment is needed.

Another aspect of codification which deserves to be specially considered is its probable effect on text-books. I do not see any reason for thinking that it would make them superfluous; and I doubt if it would greatly diminish their extent. So far as one can guess from Continental and Anglo-Indian analogy, and from the one English example of Judge Chalmers' Digest of the Law of Bills of Exchange, they would tend to assume the shape of commentaries on the Codes, or on considerable portions of them, and there would be fewer detached books on special subjects. This, it appears to me, would be a distinct gain to both writers and readers, for nothing is more troublesome to a lawyer, whether in reading or in writing, than the manner, at once wasteful and fragmentary, in which the field of legal study is covered by existing books. We have a number of treatises overlapping one another in all directions, and yet letting many things entirely or almost entirely fall through: so that a book like Williams' 'Notes to Saunders' Reports,' which is a collection of references and discussions on all sorts of topics strung together without even the pretence of arrangement, fulfils at present an important function, inasmuch as there is always some chance of finding things in it which other books omit. Not abolition, but transformation of text-books would be the result of a code. There would still be plenty of room for exposition, and some, I doubt not, for discussion. A good deal of the space which is now perforce devoted to a laborious and often barren collection

of authorities would be left free for rational explanation, and especially—though this hope may seem too sanguine—for a comparative and historical treatment which might be a powerful instrument of training in exact thought, and might raise the study of the law to something like its former rank as part of a liberal education. We might even cease to regard "jurisprudence" as a kind of mysterious knowledge so hopelessly separated from the law of England as to require a distinct course of reading. Herein I do not wish for a moment to underrate the merits and utility of legal text-books of the present type; for which, having regard to existing conditions, one cannot be too thankful. In fact, it is only the text-writers who make our present state at all tolerable. So much is this the case that, if reports go on multiplying unchecked, the leading text-books will come to be freely cited as authority; there are already signs of a tendency that way, and it may be seen in a much more developed stage in the United States. Thus we may find ourselves at no very distant time drifting into a condition much like that of ancient Roman[1] and modern Continental jurisprudence, and driven to seek authority in a mass of mixed decisions and opinions of uncertain relative value. It would then remain to be seen whether even the most inflexible supporters of the beautiful flexibility of uncodified law might not choose codification as the lesser of two evils.

From this it would be natural to turn to the subject of reporting, which is one that needs to be considered in connexion with the working of a code, and has in fact been under consideration in India. But the questions involved are too extensive to be dealt with here. There is a general feeling, I believe, that the present system is

[1] *I. e.* before Justinian.

not satisfactory, though some improvement is apparent of late years by reason of the increased authority and predominance of the Court of Appeal. I may refer to Mr. Justice Stephen's 'Minute on the Administration of Justice in British India' (published by authority, Calcutta, 1872, pp. 39—46) for some reflections on this matter which may be no less pertinent for England.

The general topic of codification can hardly be dismissed without noticing one or two current delusions about it, for so I fear they must be called. One is that the French Codes will serve as a model for imitation, or as a representative case for criticism. Of this no more need be said than I have already had occasion to say in the foregoing pages. The principal lesson to be learnt from the French Codes is that even a very defective code is far better than none. Another belief which leads to a good deal of confusion, though it is of less practical importance, is that the work effected by Justinian's commissioners on the vast and unmanageable mass of Roman law was a codification in the modern sense. This belief is so strangely wide of the facts that one feels almost bound to produce specific evidence that it exists. It may be met with in several places where one is surprised to find it. Some time ago a reviewer whose general intentions were very just and laudable, but whose illustrations from Roman law showed more zeal than knowledge, observed, in the course of a paper advocating a Ministry of Justice, that Tribonian himself could not codify English law as it now stands. There is certainly no reason to think that he could, seeing that he did not in fact codify Roman law; nor can we suppose that the idea of codification, as we now understand it, was ever present to his mind. Again, the Introduction to the New York Civil Code speaks of the Code of Justinian (meaning presumably the whole Corpus Juris) as one of

the greatest achievements of human genius. Surely the Commissioners must have unconsciously attributed the genius of the great Roman lawyers whose work is embodied in the Digest to the compilers who so handled that work as to show themselves in many places incapable of understanding it. The real nature of Justinian's rearrangement of the law may be shown by an imaginary parallel. Let us suppose a Royal Commission charged to prepare an edition of Blackstone adapted to the existing state of the law, a Digest similar in plan to Fisher's (which for this purpose we may assume not to exist), but consisting wholly or chiefly of extracts taken bodily from the Reports, and not including modern Acts of Parliament, and a separate Digest arranged in the same manner and containing the substance of the Revised Statutes. The revised Blackstone would roughly correspond to the Institutes, which are a modernized edition of Gaius; and in like manner the Digest of case-law would correspond to the Pandects or Digest of Justinian, which are a compilation from the more or less authoritative treatises that practically held a place analogous to that of reports in English jurisprudence, and the Digest of Statutes would correspond to Justinian's Code, which is a compilation of imperial rescripts and constitutions. The parallel holds, of course, only in outline; Gaius is far superior to Blackstone as a systematic legal writer, while on the other hand the arrangement of Fisher's Digest is beyond comparison more orderly and convenient than that of the Pandects or the Code. But the general resemblance is sufficient for the purpose of illustration. Now let us further suppose that these three works, when complete, are annexed by way of schedule or reference to a Government Bill with an exceedingly pompous preamble, which in due course becomes an Act and confers on all of them the force of

law. We must add that our imaginary Act would (still with much barbarous pomp of language) absolutely forbid not only the citation of any earlier reports or text-books, but the publication of any commentary whatever on the new collection. It should be hardly needful to point out that such a proceeding would not be codification; and it is hardly possible to imagine either that anything of the kind should at this day be proposed, or that, if it were proposed, all persons having a moderate acquaintance with law and legislation would not with one accord denounce it as too crude a project to be seriously entertained.

The foregoing remarks may be considered to apply to the setting forth of the law by private writers, in so far as advantages similar to those which are claimed for authentic codification would be attainable, if the claim is well founded, by the adoption of the same form in text-books. There must naturally always be a great gulf between an authentic text and a private exposition; the latter can only suggest with more or less diffidence what the authentic text, if there were one, would be like. But the resulting qualifications, grave as they are, can easily be supplied, and I forbear to dwell on them. I will only call attention to Mr. Justice Stephen's remark[1] that, whatever may be thought of the use of illustrations in a code, it is obviously desirable in an experimental application of the method by private hands, inasmuch as the reported cases given as illustrations are, if correctly stated by the writer, authoritative, whereas the general propositions of the text are not.

It remains to say something of the reasons and principles which have guided me in this particular work. The law of Partnership is in many ways a specially convenient

[1] Introduction to 'Digest of the Law of Evidence.'

subject for the treatment here adopted. It has in common with the law of Evidence the qualities of being of modern growth, homogeneous, and for the most part well settled. It is remarkably free from anomalies and technicalities, and has been singularly fortunate in the rational character of its development, by which it has earned an almost complete freedom from statutory interference. It has been otherwise with the law of Companies, which I have left apart as now depending almost entirely on statute law, and being in great measure already codified in the Companies Clauses Consolidation Act and the Companies Acts (of which last, by the way, several sections have long been in need of re-drafting), besides other enactments affecting only special classes of companies. It would be possible to prepare a consolidated edition of the Companies Acts, showing the effect of the decisions upon them by suggested modifications in the text; but the task would be a very laborious one, and almost certainly not worth the labour. The law of Partnership proper, on the other hand, lies within a moderate and manageable compass. This assertion may seem strange to the reader accustomed to Lord Justice Lindley's two goodly volumes. But it will be found that, after allowing for the parts of those volumes given to the law of Companies, and for those which deal with topics bearing on the law of Partnership in their special applications, but not forming part of it, such as Agency, the remainder would be a book of no such great size. This brings me to another reason for choosing the form of a Digest which presented itself to me with great force: I mean the extreme difficulty of writing a book in the ordinary form on the law of Partnership, which should in substance be otherwise than an abridgment of Lord Justice Lindley's. As it is, his work has throughout been the guide and foundation of my own. Without it

the toil would have been many times multiplied and the harvest precarious. I have everywhere given references to Lord Justice Lindley's book, not merely by way of acknowledgment (a tribute which is at best imperfect), but also for other reasons. First, it is a necessary part of the plan of this work to give only a selection of authorities; and it seems well that a reader desiring fuller information should be enabled to put himself, with as small loss of time as may be, in the way of knowing everything that is to be known. Thus I have some hope that this book, in addition to whatever other uses it may have, may be of some service in acting (to speak with astronomers) as a finder to Lord Justice Lindley's larger and more powerful instrument. Moreover, I have in several places deliberately cited his book as my sole and sufficient authority. There are in most branches of the law, and especially in this, clear elementary propositions, never doubted and constantly acted upon, for which it is nevertheless hard to find any reported case exactly in point. There are others, again, for which no definite authority can be produced save a Nisi Prius case from Campbell or Peake. Now it does seem to me that the twice and thrice revised opinion of a living Judge, though technically not authority, is substantially worth at least as much as a summing up delivered at Westminster or Guildhall with little or no consideration, and at a time when the subject was in its infancy; and I have ventured to frame my references on this assumption. Where there is nothing to be gained by looking out a case in the book at large, it is surely desirable, if possible, to avoid citing it at all.

I have also made considerable use of the Indian Contract Act, the last chapter of which treats of Partnership, and has adopted, as it appears to me, all that is of solid value in the corresponding title of the New York Civil Code.

This chapter, however, is by no means so full as other parts of the Act, and is somewhat unequal in execution; and, owing to I know not what accident in the framing of it by the Indian Law Commission, there is an almost entire absence of illustrations. Any one who cares to make the comparison will see that I have thought it needful to go much more into detail. It will be understood that I am far from assuming to criticize the Indian Act on its own ground, since it is an open question whether the kind of completeness which Englishmen require in a statement of English law be necessary or desirable for Anglo-Indian purposes.

Following Mr. Justice Stephen's example, I have aimed at fixing the limits of the subject-matter so as to exclude all merely collateral topics. Thus the capacity of persons to become partners is not different from their general capacity for contracting; that question, accordingly, is left aside as belonging to the general law of contract. In the same way the manner in which the existence of a partnership may be proved belongs to the law and practice of evidence; nor has it been expressly stated that no particular form is required for the contract of partnership, as the law of contract in its modern shape assumes throughout that no special form is needful where none is expressly prescribed. So, again, the general principles of agency are not entered upon, though they are the foundation of the special rules which determine a partner's authority as agent of the firm. For the like reason nothing is said of fraud as a cause for rescinding the contract of partnership, the liability to rescission on this ground being one to which it is subject in common with all other contracts, and which in this application presents no peculiar features. In the third part of this Digest, entitled 'Of Procedure and Administration,' I have relaxed these limits on grounds

of practical convenience, but have endeavoured not to lose sight of them, and have abstained, for instance, from stating rules which are simply part of the general law of Bankruptcy. The whole of the third part, however, may be regarded as supplemental and provisional. Elsewhere many readers will probably think I have included too little; my own impression, speaking with regard to the form and method here chosen, is that I have sometimes included too much. The full, discursive, exhaustive treatment of the subject, which is amply provided in the standard work already spoken of, would be out of place in a Digest. I have thought it desirable, however, to add a certain amount of commentary; and it seemed better on the whole to insert this matter in order as it was called for than to relegate it to an appendix. The illustrations are taken from decided cases, with only one or two exceptions, and those of so simple a kind as to be obviously free from risk.

Lastly, I would express a hope which is bolder, perhaps, than any I have yet put forward. Mr. Justice Stephen has said, and as I believe with perfect truth, that "the only thing which prevents English people from seeing that law is really one of the most interesting and instructive studies in the world is that English lawyers have thrown it into a shape which can only be described as studiously repulsive." And this is not mere theoretical opinion; for, as he further tells us, Indian experience has actually shown "that when law is divested of all technicalities, stated in simple and natural language, and so arranged as to show the natural relation of the different parts of the subject, it becomes not merely intelligible but deeply interesting to educated men practically conversant with the subject-matter to which it relates." The subject-matter of the present work is one in which many important interests are

involved, and with which many educated men are practically conversant. I have endeavoured, so far as possible, to state the law in simple and natural language, to divest it of technicality, and to exhibit the different parts of the subject in their natural relation. It is, I trust, not irrational to hope that a work of this kind may be sufficiently intelligible, and to some extent interesting and useful, to men of business who are not lawyers. Bentham's saying notwithstanding,[1] I do not think it possible in a land of ancient and complex civilization to make every man his own lawyer; but I do believe it possible to put within every man's reach, not indeed a full knowledge, but a knowledge clear, sound, and exact, as far as it goes, of the laws he lives under and has to do with in his own daily business. If within its own limited sphere the present attempt fails to contribute anything towards that end, I am persuaded that the failure is due not to an aim beyond reason in the intention, but to my own shortcomings in the performance.

Since the last foregoing paragraph was first written and published (and I purposely let it stand in its original form) much has happened to show that codification of English law, and in some cases codification by private enterprise, is both possible and practicable. How far it

[1] "Every man his own lawyer!—Behold in this the point to aim at."—Papers on Codification, No. viii, Letter 4. Bentham's view is really the negation of law as a science. In our own time Ihering has pointed out, much more philosophically, that law has indeed to justify itself by common sense in the last resort, but untrained and inexperienced common sense cannot therefore take the place of law. Common sense will not even make a man his own ploughman or his own shoemaker.

shall be accomplished, and how soon, depends partly on the leisure and temper of the House of Commons, partly on the desires and interest of the public. I am bound to say that the indifference of the public at large to the whole matter does not seem to have sensibly diminished of late years. On the other hand, the Bills of Exchange Act (in the full title of which the word "codify" is for the first time used by Parliament) shows that codification of a particular branch of law can be carried through when a strong body of competent and interested persons have agreed to demand it. Somewhat has been done, too (though as yet with no definite result), as regards the Law of Partnership itself. A fuller account of this attempt is given in the Appendix. There has been no legislation to take account of since the date of the last edition; but there have been decisions of considerable importance. Some of them suggest the reflection that the consequences of Kendall *v.* Hamilton (see p. 31 of the present edition) are by no means exhausted.

F. P.

13, Old Square, Lincoln's Inn,
December, 1887.

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REFERENCES, ETC.

References to the Law Journal are now supplied for cases in the Superior Courts of Common Law down to the commencement of the Law Reports. All modern cases decided by Superior Courts are also dated. The consecutive number of the volumes of the Law Journal (N.S., Chancery and Common Law Series) for a given legal year, *i.e.* Michaelmas term to Michaelmas term, may be found by subtracting 30 from the year of the century in which that legal year begins. To find the corresponding volume of the Weekly Reporter, subtract 51.

Lindley on Partnership (4th edition, 1878) is cited by the author's name alone.

The Indian Contract Act (IX. of 1872) is cited by the abbreviation I. C. A.

I have sometimes referred to my own book on "Principles of Contract" (4th edition, 1885) for the fuller explanation of matters belonging to that general subject rather than to the Law of Partnership.

Matters of practice and procedure which occur incidentally in the facts of the cases cited as Illustrations have been tacitly adapted to the present state of the law.

A DIGEST

OF THE

LAW OF PARTNERSHIP.

PART I.

The Contract of Partnership.

CHAPTER I.

Who are Partners.

Chap. I. Art. 1.

Definition of partnership.

1. PARTNERSHIP is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them.

Illustrations.

1. A. agrees with B. to carry the mail by horse and cart from Northampton to Brackley on the following terms: B. is to pay to A. £9 per mile per annum, and A. and B. are to share the expenses of repairing and replacing the carts, and to divide equally the money received for conveying parcels, and the loss consequent on any loss or damage thereof. A. and B. are partners.[1]

2. A., the owner of a vessel, employs B. for some time as skipper, and then agrees with B. that B. may take the vessel

[1] *Green* v. *Beesley* (1835), 2 Bing. N. C. 108.

Chap. I. Art. 1.

where he likes, and engage the crew and take cargoes at his discretion, paying to A. one-third of the net profits. A. and B. are probably partners in the adventure.[1]

3. A. and B. are owners in common of a race-horse, and agree to share its winnings and the expenses of its keep, A. having the management of the horse and paying all expenses in the first instance. A. and B. are not partners as to the horse. It is doubtful whether they are partners as to the profits that may be made by its employment.[2]

4. A. and B., tenants in common of a house, and desiring to let it, agree that A. shall have the general management, and provide funds for putting the house in tenantable repair, and that the net rent shall be divided between them equally. A. and B. are not partners.[3]

5. A., the proprietor of a theatre, lets the use of it to B., who provides the acting company and takes on himself the whole management, A. paying for the general service and expenses of the theatre. The gross receipts are divided equally between A. and B. A. is not a partner with B., and is not answerable for any infringement of dramatic copyright in the performances given by B. under this arrangement.[4]

6. A., B., and C. agree to purchase "on joint account" the X. estate, "each paying one-third of the cost and each having one-third interest in it," and to form a new company to deal with the property. This agreement does not constitute a partnership between A., B., and C.[5]

Proposed definition explained.

The definition of partnership given by the Indian Con-

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[1] *Steel* v. *Lester* (1877), 3 C. P. D. 121, see judgment of Lindley, J.

[2] *French* v. *Styring* (1857), 2 C. B. N. S. 357; 26 L. J. C. P. 181.

[3] Per Willes, J., 2 C. B. N. S. at p. 366. But if they furnished the house at their joint expense, and then let portions of the house as lodgings, they might well be partners. Letting a house is not a business, but letting furnished rooms is.

[4] *Lyon* v. *Knowles* (1863), 3 B. & S. 556; 32 L. J. Q. B. 71.

[5] *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, 143.

tract Act, s. 239, is Kent's definition (*Comm.* iii. 23) in a more concise form, and runs as follows :—

Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.

Kent's definition was criticized by Jessel, M.R., in *Pooley* v. *Driver* (1876), 5 Ch. D. at p. 472, on the ground that there may be partners who do not contribute any property, labour, or skill, as where a share is given to the widow of a former partner. "Whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary." The definition now proposed is intended to meet this criticism by avoiding reference to the partners' contributions to the common fund. At the same time a partner's share is not the less his property because it may have been given to him for the purpose of being used in that way, and even given out of the share of another partner. On the other hand, division of profits, as we shall immediately see, is not a sufficient though it is a necessary test of the existence of a partnership. A man may in sundry ways take a share of the profits of a business without having such a share in the business as will make him a partner. He will not be a partner unless he has a direct and principal interest in the business, or, as expressed in *Cox* v. *Hickman* (art. 2, illust. 1), unless the business is conducted on his behalf.

A number of other definitions of partnership are collected from various English and other sources at the beginning of Lord Justice Lindley's work. It is there said that most of them are, with reference to English law, too wide, as including corporations and joint-stock companies which are not subject to the ordinary law of partnership. But it

Chap. I. Art. 1.

seems hardly satisfactory to say that the members of such bodies are not partners at all; for the analogy of partnership law does apply to them for some purposes, and those not unimportant ones; as, for instance, when questions arise as to the power of majorities to bind dissenting members. And on the whole it seems best to follow the example of the Indian Act, and, instead of excluding these associations from the category of partnerships, treat them as "extraordinary partnerships" regulated by special legislation.[1]

The nearest approach to a definition which has been given by judicial authority in England is the statement that "to constitute a partnership the parties must have agreed to carry on business and to share the profits in some way in common;"[2] where "profits" means the excess of returns over outlay. This principle at once excludes several kinds of transactions which at first sight have some appearance of partnership.

What is not partnership: common ownership.

Among its applications, exemplified in the cases above cited as illustrations, are these:—The common ownership of any property does not of itself create any partnership between the owners; moreover, there may be an agreement as to the management and use of the property, and the application of the produce or gains derived from it, without any partnership arising.[3] On the other hand, there may be a part ownership without partnership in the pro-

[1] I. C. A. s. 266; see Art. 8, below.

[2] *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. at p. 436.

[3] Illustrations 2, 3, and 6:—Lindley, i. 20, 24, 58. As to part owners of ships (the most common and important case), see Lindley, i. 66; Maude and Pollock on Merchant Shipping (4th Ed.), 100; Maclachlan on Merchant Shipping (2nd Ed.), 90, 102; Smith, Merc. Law (8th Ed.), 191; Kent, Com. iii. 154, 155; and Story on Partnership, ch. xvi. *passim*.

perty itself, together with a real partnership in the business of managing it for the common benefit.[1]

Sharing gross returns.

The sharing of gross returns, with or without a common interest in property from which the returns come, does not of itself create any partnership.[2] It is practically more important to exclude from the definition these relations more or less resembling it at first sight than to make the definition affirmatively complete. Even an agreement to bear a definite share of loss as well as take a definite share of profit is not necessarily a partnership, for the purpose of giving either party the rights of a partner as against the other, though an unqualified agreement to share profit and loss is very strong evidence of partnership.[3]

Agreement to share profit and loss.

Specific performance of partnership contracts.

The remedy of specific performance is generally not applicable to an agreement to enter into partnership: for "it is impossible to make persons, who will not concur, carry on a business jointly for their own common advantage." But where such an agreement has been acted on, the execution of a formal deed recording its terms may be ordered by way of specific performance if necessary to do justice between the parties.[4]

"Joint adventure."

Scottish writers make a difference between partnership proper and "joint adventure," which is thus defined in Bell's Principles, art. 392:—

Joint adventure or joint trade is a limited partnership, confined to a particular adventure, speculation, course of

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[1] Illustration 2:—Cockburn, C.J., 2 C. B. N. S. 363 (1857); cp. *Crawshay* v. *Maule* (1818), 1 Swanst. at p. 523; *Steward* v. *Blakeway* (1869), 4 Ch. 603.

[2] Illust. 5.

[3] *Walker* v. *Hirsch* (1884), 27 Ch. Div. 460; *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698, cannot now be relied on; see the remarks of the Lords Justices on it in *Walker* v. *Hirsch*.

[4] *England* v. *Curling* (1844), 8 Beav. 129, 137; *Scott* v. *Rayment* (1868), 7 Eq. 112.

Chap. I. Art. 2.

trade, or voyage; and in which the partners, either latent or known, use no firm or social name, and incur no responsibility beyond the limits of the adventure.

I do not find that the incidents of a "joint adventure," as far as it extends, can be distinguished from those of partnership; but, whatever the importance of the distinction may be, it is not met with in the English authorities.[1] We may compare with "joint adventure" the "association en participation" recognized by French law (Code de Comm. 47—50). But this seems to include transactions which, according to our rules, are not partnerships at all, such as the purchase of goods on common account to be divided among the associates. See the collection of authorities in the Codes Annotés. In the same way *société* is a wider term than our "partnership." It covers such matters as the sharing of benefit derived from the common use or enjoyment of anything by owners or tenants in common.

Sharing profits only evidence of partnership.

2. The receipt of a share of profits, or of a payment contingent upon or varying with profits, is relevant but not conclusive to show the existence of a partnership. Whether a partnership does or does not exist in any particular case depends on the real intention and contract of the parties as shown by the whole facts of the case.[2]

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[1] Lord Eldon seems to have denied it. 3 Dow, at p. 229.

[2] *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, 435. "Participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists." Per Cotton, L.J., 6 Ch. D. at p. 315.

Illustrations.

Rule in *Cox* v. *Hickman*, and later applications.

1. A trader is indebted to several creditors, and they enter into an arrangement with him by which the trade is to be conducted under their superintendence, and they are to be gradually paid off out of the profits. These creditors do not thereby become partners of the debtor in his trade, or liable for the debts of the concern: for "the real ground of the liability," where such liability exists, "is that the trade has been carried on by persons acting on his behalf;"[1] and in the case of such an arrangement as this, the trade is not carried on by or on account of the creditors. The test of liability is not merely whether there is a participation of profits, but whether there is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.[2]

2. C. H. becomes security for £10,000 for his son W. H., on W. H. becoming a member of Lloyd's. W. H. agrees in writing with C. H. that, among other things, S. and no other person shall underwrite in the name of W. H.; that S. shall be paid £200 a year and one-fifth of the net profits of underwriting; that C. H. may withdraw his security on notice, and S. shall thereupon cease to underwrite for W. H.; and that one half of the net profits, after deducting the share of S., shall, together with the sum of £25 per annum, be considered as owing and be paid to C. H. by W. H. Under this agreement C. H. is not a partner but a creditor of W. H.[3]

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[1] *Cox* v. *Hickman* (1860), 8 H. L. C. 268, 306 (the leading case which put the law on its present footing).

[2] Lord Wensleydale in *Cox* v. *Hickman* (1860), 8 H. L. C. at pp. 312-3; Blackburn, J., in *Bullen* v. *Sharp* (1865) (Ex. Ch.), L. R. 1 C. P. at pp. 111-12; Cleasby, B., *Ib.* at p. 118; and further on the effect of *Cox* v. *Hickman*, Bramwell, B., *Ib.* at p. 127, and Lindley, i. 39.

[3] *Ex parte Tennant* (1877), 6 Ch. Div. 303. Compare *Bullen* v. *Sharp* (1865) (Ex. Ch.), L. R. 1 C. P. 86, a somewhat similar case, where there was no actual division of profits.

3. A partnership is entered into for a term certain, and it is provided by a clause in the articles that if a partner dies before the end of the term his representatives shall during the rest of the term receive the share of profits he would have been entitled to if living: a partner having died, his share of profits is paid from time to time to his executors under this agreement; the executors do not thereby become partners.[1]

4. The business of an underwriter is conducted by A. in the name of B., and A. receives a fixed salary and one-fifth of the profits, subject as to this one-fifth to be wholly or partially refunded in the event of unexpected losses becoming known after the division of profits in any year. The contract between A. and B. is not one of partnership, but of hiring and of service.[2]

5. A creditor, J., makes an agreement with his debtors, T. and W., by which the sum due to him is to be paid out of the profits of a building speculation to be executed by T. and W., J. furnishing that part of the materials which belongs to his own trade; and after payment of the debt, and paying for these new materials, the surplus is to belong to T. and W. J. does not become a partner of T. and W., and is not liable for the price of goods ordered by them for the purpose of being used in the building.[3]

6. A., a publisher, agrees to publish at his own expense a book written by B., and to pay to B. half the net profits, if any, as ascertained by a certain conventional method of taking accounts. It is doubtful whether this does or does not constitute a partnership between A. and B.;[4] but B. is not

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[1] *Holme* v. *Hammond* (1872), L. R. 7 Ex. 218.

[2] *Ross* v. *Parkyns* (1875), 20 Eq. 331.

[3] *Kilshaw* v. *Jukes* (1863), 3 B. & S. 847; 32 L. J. Q. B. 217.

[4] In *Reade* v. *Bentley* (1858), 4 K. & J. 656, Lord Hatherley, then V.-C. Wood, seems to have thought the "half-profits" contract did create a partnership. Lord Justice Lindley (On Partnership, i. 21, note *q*) thinks otherwise. So did the Court in the Scotch case of *Venables* v. *Wood*, there cited by him (see next note); but there, even if there had been a partnership, it was very difficult to make out that the debt sued for was a partnership debt.

liable to a paper-maker for paper supplied to A. for the general purposes of A.'s publishing business, and used for printing B.'s book.[1]

The following special provisions were added in 1865, by the Act to amend the Law of Partnership (28 & 29 Vict. c. 86), sometimes cited as Bovill's Act:[2]

Act to amend Law of Partnership: as to persons advancing money for share of profits.

3. "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing[3] with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such."

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[1] *Venables* v. *Wood* (1839), 3 Ross, L. C. on Commercial Law, 529; cp. *Wilson* v. *Whitehead* (1842), 10 M. & W. 503; 12 L. J. Exch. 43.

[2] This Act is stated in Lord Justice Lindley's work (p. 43) to have been passed "in order to remove the difficulties which it was felt might be created by the decision in *Cox* v. *Hickman*." It appears, however, by reference to the Parliamentary reports and papers of the time, that the Act, as taken up by the Government of the day and finally passed, was the residue of an attempt to introduce a system of limited partnership intended to correspond to the Continental *société en commandite*. It is also clear that the real extent and effect of *Cox* v. *Hickman* were not at the time suspected by any one.

[3] That is, a signed contract (*Pooley* v. *Driver* (1876), 5 Ch. D. at p. 468), showing on the face of it that the transaction is one not of partnership, but of loan: *Syers* v. *Syers* (1876), 1 App. Ca. 174, per Lord Chelmsford.

Illustrations.

1. A., the proprietor of a music-hall, signs and gives to B., in consideration of an advance of £250, a paper in the following terms: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the O. music-hall, to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86." This is not a contract for a share of profits within the Act, but constitutes a partnership at will, in which, as between A. and B., B. is to share profit without being liable for loss.[1]

2. B. & Co. are traders in partnership. A. lends money to the firm on a contract in writing, under which B. & Co. agree, among other things, to repay the loan at the end of the partnership, to conform to the partnership deed, which is to be open to A.'s inspection, and to pay annually on account of profits a definite share of net profits during the continuance of the loan. The agreement also contains a provision that in the event of A.'s bankruptcy B. & Co. may pay off the loan and determine the agreement, a provision for settlement of accounts at the end of the partnership, and payment of the loan and stipulated share of profits out of assets, subject to the refunding by A. of any sum not exceeding the amount of the original advance which may appear to have been overpaid on account of profits, and an arbitration clause. The agreement expressly purports to be for an advance by way of loan under the provisions of 28 & 29 Vict. c. 86. This transaction is merely colourable as a loan, and is not within the Act, and A. is liable as a partner for the debts of B. & Co.[2]

3. A., B., and C. enter into an agreement in writing, expressly referring to 28 & 29 Vict. c. 86, and reciting that A. and B. have agreed to become partners in a certain business, and have requested C. to lend them £10,000 to be invested in it. The agreement declares that the money is advanced by C. to A. and B. by way of loan under the 1st section of the Act, and such advance shall not be considered to make C. a

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[1] *Syers* v. *Syers* (1876), 1 App. Ca. 174.
[2] *Pooley* v. *Driver* (1876), 5 Ch. D. 458.

partner. This sum of £10,000 appears by the agreement to be, and in fact is, the whole capital of the business.

By other clauses of the agreement C. is entitled to inspect the books and receive a copy of the annual account, and to share profits in a fixed proportion, and has the option of demanding a dissolution of the partnership and conducting the liquidation of the business in certain events. C.'s capital invested in the business is not to be withdrawn till the termination of the partnership. Under this agreement C. is a partner with A. and B.[1]

As to agent remunerated by share of profits.

4. "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

As to widows or children of deceased partners receiving share of profits as annuity.

5. "No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of or to be subject to any liabilities incurred by such trader."

As to seller of goodwill receiving share of profits.

6. "No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt be deemed to be a partner

[1] *Ex parte Delhasse* (1877-8), 7 Ch. Div. 511.

Chap. I. Art. 7.

of or be subject to the liabilities of the person carrying on such business."

Creditor receiving share of profits to be postponed to other creditors for value in case of bankruptcy, &c.

7. "In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interests payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."[1]

Whether the Act adds to *Cox* v. *Hickman*, *qu.*

It is by no means certain that this Act really adds anything material, except the disabilities imposed by s. 5, to what had already been decided in *Cox* v. *Hickman*.[2] In any case the special provisions of the Act, even if to some extent superfluous, are not to be taken as in any way detracting from the generality of the principle there laid down.[3] When this Act was introduced and passed, it was assumed by the most competent persons, including some of

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[1] 28 & 29 Vict. c. 86, ss. 1—5. The word "person" in the Act includes a partnership firm, a joint-stock company, and a corporation: s. 6. See comments in Lindley, i. 44-7.

[2] 8 H. L. C. 268 (1860).

[3] See *Holme* v. *Hammond* (1872), L. R. 7 Ex. at pp. 227, 232.

the Lords who had taken part in the decision of *Cox* v. *Hickman*,[1] that it would make a material change in the law; but after the exposition and discussion of *Cox* v. *Hickman*[1] in recent cases, it is difficult to say what, if anything, the Act really adds to the effect of that case. It has been suggested that, whereas *Cox* v. *Hickman*[1] decides only that sharing profits is not *conclusive* evidence of partnership, and leaves it to be dealt with as a question of fact whether this is *sufficient* evidence in any case, the Act goes a step further, and prevents it from being alone sufficient in any of the classes of cases dealt with.[2]

On the other hand, the cases above cited show that the Act will afford no protection to attempts to combine the rights of a partner and of a lender by contracts for nominal and merely colourable loans. There must be not merely an advance to the business, but a loan to a real debtor who is personally liable.[3]

Exclusion of creditor sharing profits from competition with others is absolute.

With regard to a creditor who has lent money in consideration of a share of profits, the Act excludes him absolutely and according to its literal terms from competing with other creditors. It does not matter whether they were or were not creditors during the continuance of the loan, nor whether they were creditors in the business or not. Nor can such a creditor prove his debt in the bankruptcy until all the other creditors are paid.[4] But if, during the same time, he has lent other sums at a fixed rate of interest, he may recover those sums like any other creditor.[5] If it were sought to evade this prohibition and make the

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[1] 8 H. L. C. 268 (1860).

[2] 1 Sm. L. C. (9th Ed.) 909; 5 Ch. D. 485; 7 Ch. Div. 531.

[3] See, in addition to the cases already cited, *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536.

[4] *Ex parte Taylor* (1879), 12 Ch. Div. 366, 379.

[5] *Ex parte Mills* (1873), 8 Ch. 569.

Chap. I. Art. 8.

Act an instrument of fraud, by advancing a small sum in consideration of a large share of profits, and a large sum at fixed interest, the lender would probably be treated as a partner.[1] The operation of s. 5 is not excluded by lending money for fixed interest and a sum equal to a specified share of profits, and calling that additional sum a salary.[2]

This express postponement of the creditor receiving a share of profits is in truth a clumsy way of putting him approximately in the position of a true limited partner, or *commanditaire* in the French terminology. For some reason which I have never been able to understand, people in this country seem to find almost invincible difficulty in grasping the conception of a partner with limited liability who, being a true partner, is not a creditor of the firm at all, so that there can be no question of his competing with creditors in respect of his capital. Yet the position of a shareholder in a limited company (which is essentially the same thing) is now quite familiar. Hence the very imperfect success of Bovill's Act, and the failure of other attempts in the same direction.

It is to be observed that the 5th section of the Act "does not deprive the lender of any security he may take for his money;" if he has taken a mortgage, for instance, his rights as mortgagee are not affected,[3] and he may enforce any such security by way of foreclosure or sale.[4]

Limit to number of partners in an ordinary partnership.

8. An ordinary partnership may consist of any number of persons not exceeding ten,

[1] *Ex parte Mills* (1873), 8 Ch. at pp. 574—6.
[2] *Re Stone* (1886), 33 Ch. D. 541.
[3] Lindley, i. 45; *Ex parte Sheil* (1877), 4 Ch. Div. 789.
[4] *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536.

where the business of the partnership is banking, and not exceeding twenty where it is any other business.

A partnership consisting of any greater number of persons (hereinafter called an extraordinary partnership) must either be

a. Registered as a company under the Companies Act, 1862, or

b. Formed in pursuance of some other Act of Parliament or of letters patent, or

c. A company engaged in working mines within and subject to the jurisdiction of the Stannaries.[1]

Extraordinary partnerships are governed by the several statutes, instruments, laws, and customs which are specially applicable thereto respectively.

At common law there was no limit to the number of persons who might enter into partnership, and it is the better opinion[2] that there was nothing to prevent them from dividing the capital into transferable shares and acting as a joint-stock company; but there were always great practical inconveniences about this. A partnership not complying with the conditions of the Companies Act is now illegal, and the members of such an association would be unable to enforce any claim arising out of the partnership dealings, although they would be individually liable for the debts of the concern to a creditor who had dealt

[1] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

[2] Lindley, i. 191, 195.

Chap. I. Art. 8.

with the firm without notice of the state of things making its business illegal.[1]

Associations carrying on that which at common law would be a partnership business, but exceeding the number of ten in the case of banking, and twenty in the case of any other business, and complying with the law by coming within one of the special categories laid down in the Companies Act, may be called extraordinary partnerships. They are governed by special rules of law, for the most part statutory, which we shall not here enter upon. The statutes, however, are to a considerable extent founded upon the principles of ordinary partnership law, so that they cannot be sufficiently understood without a knowledge of those principles.

Of the kinds of extraordinary partnerships above specified, the class (*a*) are necessarily corporations, the association being made an artificial person with rights and duties distinct from those of the natural persons who at any given time are members of it.

The class (*b*) are generally but not necessarily[2] incorporated.

The class (*c*) are in no case incorporated, but are ordinary partnerships modified by local custom, and since 1869 by statute also.[3]

It may be useful to note here that there are associations which, though not partnerships, yet exist for the acquisition of gain by their members within the meaning of the

[1] See Lindley, i. 196, 199. A creditor who has notice, *e. g.* a solicitor who has rendered professional services in forming and carrying on the association, knowing the number of members to exceed twenty, cannot recover: *Re S. Wales Atlantic Steamship Co.* (1875-6), 2 Ch. Div. 763.

[2] By 7 Wm. 4 & 1 Vict. c. 73, the Crown may establish companies by letters patent without incorporation.

[3] The Stannaries Act, 32 & 33 Vict. c. 19.

Companies Act, and are therefore unlawful if not registered: for example, a mutual marine insurance association,[1] or mutual benefit[2] or loan[3] society. On the other hand societies may be formed for such purposes as investment of money, or buying property and re-selling it to the individual members, which are neither partnerships nor for the acquisition of gain on a common account; and such societies do not need registration even if the number of members exceed twenty.[4]

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[1] *Padstow Assurance Association* (1882), 20 Ch. Div. 137.
[2] *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225.
[3] *Shaw* v. *Benson* (1883), 11 Q. B. Div. 563.
[4] *Re Siddall* (1885), 29 Ch. Div. 1; cp. *Smith* v. *Anderson* (1880), 15 Ch. D. 247.

CHAPTER II.

Of the Firm.

Chap. II. Art. 9.

The firm.

9. "PERSONS who have entered into partnership with one another are called collectively a firm."[1]

Partners may adopt firm-name and use it in all partnership affairs.

10. The business of a firm may be carried on under any name, not distinctly purporting to be a corporate name, which the partners think fit to adopt for that purpose, subject to the condition mentioned in the next following article.

The name so adopted is the name of the firm, and all acts done and instruments executed in that name by a partner or other person duly authorized thereto are binding on all the partners.[2]

Exclusive right of firm to trade name.

11. Where a particular name under which a business is carried on by any person, firm, or company has become associated with and appropriated to that business, no other person may carry on a like business under the same name,

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[1] I. C. A. s. 239.

[2] As to the authority of partners to bind the firm, see Arts. 17—21, below.

or a name only colourably differing therefrom, in a manner calculated to deceive customers by leading them to believe that they are dealing with such person, firm, or company as first mentioned.[1]

What use of names is lawful.

Generally speaking, every man is by the law of England free to call himself by what name he chooses, or by different names for different purposes,[2] so long as he does not use this liberty as the means of fraud or of interfering with other substantive rights of his fellow-citizens. And this extends to commercial transactions as well as to the other affairs of life: "Individuals may carry on business under any name and style they may choose to adopt."[3] The style of the firm need not and often does not express the name of any actual member of it. It may contain, and often does contain, other names, or no individual names at all. On the other hand, although no man is to be prevented from carrying on any lawful business in his own name by the mere fact of his name and business being like another's,[4] yet the mere fact of the name itself being his own does not give him any right or licence to do so

[1] See the authorities cited in the following notes. This article is inserted here for convenience, though it obviously belongs, properly speaking, not to the law of partnership, but to that subdivision of the general law of ownership which has to do with copyright and other analogous rights.

[2] See the note in 3 Dav. Conv. pt. i. 357—362. Strictly speaking, this does not apply to names of baptism. The same or greater freedom existed in the Roman law, which allowed a change of *nomen*, *prænomen*, or *cognomen* alike. C. 9, 25, *de mutat. nom.* 1.

[3] Per Erle, C.J., *Maughan* v. *Sharpe* (1864), 17 C. B. N. S. at p. 462; 34 L. J. C. P. 19; and see remarks of Jessel, M.R., in *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560; *Levy* v. *Walker* (1879), 10 Ch. Div. 436, 445.

[4] *Burgess* v. *Burgess* (1853), 3 D. M. G. 896.

Chap. II. Art. 11.

with such additions or in such a manner as to deceive the public, and make them believe they are dealing with some one else.[1]

Assumption of corporate name.

It is said to be an offence against the prerogative of the Crown for private persons to "assume to act as a corporation." But it is by no means clear how it can be punished (though possibly the Queen's Bench Division may have jurisdiction to punish it by fine).[2] And at all events the use of a description such as "Company," which by common usage is applicable to incorporated and unincorporated associations alike, does not amount to the offence in question.[3]

Foreign laws as to trade names.

The laws of Continental states are much more strict and definite as to the use of trade names. In France the style of a commercial firm (*raison sociale*) must contain no other names than those of actual partners.[4] In Germany it must, upon the first constitution of the firm, contain the name of at least one actual partner, and must not contain the name of any one who is not a partner;[5] but when the name of the firm is once established in conformity with

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[1] *Holloway* v. *Holloway* (1850), 13 Beav. 209; *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. Div. 748.

[2] The attempt to establish a guild or "communa" without warrant was formerly punishable by fine. Madox, Hist. Ex. i. 562, gives several instances from 26 H. 2. Many of these "adulterine guilds," as they are called, in London and Middlesex; the burgesses of Totnes and of Bodmin; and Ailwin the mercer and other townsmen of Gloucester, were amerced in considerable sums on this account. See Stubbs, Const. Hist. i. 418. It can hardly be said, however, that these bodies "assumed to act as corporations" in the modern technical sense.

[3] Lindley, i. 182.

[4] Code de Commerce, 21. For the French law as to the use of family names generally, see *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430.

[5] Handelsgesetzbuch, 17.

these rules, it may be continued notwithstanding an assignment of the business, or changes in the persons who are partners for the time being, subject to certain consents being given.[1]

Exclusive right to trade names analogous to property in trade mark.

But although "in this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger," yet "the right to the exclusive use of a name in connexion with a trade or business is familiar to our law."[2] This right is analogous to, but not identical with, the right to a trade mark proper. The right of the possessor of a trade mark in the strict sense (which is now subject to statutory conditions under the Patents, Designs and Trade Marks Act, 1883, 46 & 47 Vict. c. 57), is to prevent competitors from trading on his reputation, and passing off their wares as his own by means of copies or colourable imitations of the visible sign or device which he has appropriated to his business; and the right of the possessor of a trade name stands on the like footing. "The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."[3]

May be infringed by means of trade

The right to a particular name may likewise be infringed circuitously by means of a trade mark fitted to bring goods

[1] Handelsgesetzbuch, 23, 24.

[2] *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430, 441.

[3] Giffard, L.J., in *Lee* v. *Haley* (1869), 5 Ch. at p. 161. The same principle has been acted on by the Courts of France: Sirey, Codes Annotés, on Code de Commerce, 18, 19, no. 46 of note.

marks apart from infringement of trade mark as such.

into the market under a deceptive name. In such a case the first appropriator of the name has his remedy no less than if the name had been directly adopted by his rival, and it is no answer to his complaint to say that there is no such physical resemblance between the trade marks as would deceive a customer of ordinary caution. The trade-mark complained of may be free from offence in its primary character and office as a visible symbol; but that will be no excuse for a breach of the distinct duty to respect the trade names as well as the trade marks of other dealers.[1] And it is immaterial whether there be any fraudulent intention or not.[2]

Whether action lies against corporation for trading in its corporate name, where the name itself is an infringement of existing trade name.

Where a name of incorporation is such as to be, if used for trading purposes, an infringement of an existing trade-name, it is doubtful whether an action can be maintained against the corporation for trading in its corporate name, or whether the only remedy is not against those persons individually who procured that name to be given.[3] But such an action, it is submitted, may well lie. For though it may be true that the corporation has no power to trade under any other name than its proper name of incorporation, yet it is in no way bound to trade at all; and if it has a name under which it cannot trade without interfering with other persons' rights, that is its misfortune, but can surely make no difference to their rights.

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[1] *Seixo* v. *Provezende* (1865), 1 Ch. 192. The leading authorities on this and the allied subject of trade marks are collected in *Cope* v. *Evans* (1874), 18 Eq. 138; see too the explanations and distinctions given in *Singer Manufacturing Co.* v. *Wilson* (1876), 2 Ch. Div. at pp. 441 *seq.*, by Jessel, M.R., and S. C. in C. A. *ib.* 451 *seq.*; and further, on the subject generally, per Lord Blackburn, *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Ca. 29.

[2] *Hendriks* v. *Montagu* (1881), 17 Ch. Div. 638.

[3] *Lawson* v. *Bank of London* (1856), 18 C. B. N. S. 84; 25 L. J. C. P. 188.

No trade name without actual business.

There can be no trade name unless in connexion with an existing business. A man cannot appropriate a name for this purpose by the mere announcement of his intention to trade under it.[1]

Firm not recognized as artificial person.

It may be proper to mention here that the law of England knows nothing of the firm as a body or artificial person distinct from the members composing it,[2] though the firm is so treated by the universal practice of merchants and by the law of Scotland. In England the firm-name may be used in legal instruments both by the partners themselves and by other persons as a collective description of the persons who are partners in the firm at the time to which the description refers:[3] and under the Rules of the Supreme Court actions may now be brought by and against partners in the name of their firm.[4] An action between a partner and the firm, or between two firms having a common member, was impossible at common law, and it has not yet been decided that it is possible since the Judicature Acts; but Lord Justice Lindley's opinion is in favour of such actions being now maintainable, and probably in the firm-names.[5] Nevertheless the general doctrine that "there is no such thing as a firm known to the law"[6] remains in force. In Scotland, on the other hand, the firm is a "separate person"; not only can it sue and be sued in the "social name," but it may sue and be sued by its own members, and firms having one or more members in common may sue each other.[7]

Otherwise in Scotland.

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[1] *Lawson* v. *Bank of London* (1856), 18 C. B. N. S. 84; 25 L. J. C. P. 188.

[2] Lindley, i. 207.

[3] *Ib.* 208-9.

[4] Order ix. r. 6, etc.; Arts. 64—68, below.

[5] i. 212, 469.

[6] James, L.J., *Ex parte Corbett* (1880), 14 Ch. Div. at p. 126.

[7] Bell, Pr. of Law of Scotland, § 357; Second Report of the

Chap. II. Art. 12.

Guaranty for or to a firm not binding, as to events happening after a change in the constitution of the firm, unless contrary intention appears (Mercantile Law Amendment Act).

12. "No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or a single person trading under the name of a firm, shall be binding on the person making such promise, in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."[1]

This affirms common law.

This enactment of the Mercantile Law Amendment Act, 1856, is believed to have only affirmed the result of previous decisions.[2] The Indian Contract Act has a similar and more concisely worded provision (s. 260):—

"A continuing guaranty given either to a firm or to a third person in respect of the transactions of a firm is, in

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Mercantile Law Commission, 18, 141. Where the firm name is merely descriptive and impersonal, however, as "The Carron Iron Company," some of the members must be joined by name in the action.

[1] 19 & 20 Vict. c. 97, s. 4.

[2] *Backhouse* v. *Hall* (1865), 6 B. & S. 507, 520; 34 L. J. Q. B. 141, per Blackburn, J. 2 Wms. Saund. 821; Lindley, i. 214.

the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guaranty was given."

Evidence of intention that guaranty shall continue.

An intention that the promise shall continue to be binding, notwithstanding a change in the members of the firm, cannot be inferred from the mere fact that the primary liability is an indefinitely-continuing one; as, for example, where the guaranty is for the sums to become due on a current account.[1] Such intention may appear "by necessary implication from the nature of the firm" where the members of the firm are numerous and frequently changing, and credit is not given to them individually, as in the case of an unincorporated insurance society.[2]

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[1] *Backhouse* v. *Hall* (1865), 6 B. & S. 507, 520; 34 L. J. Q. B. 141.

[2] See *Metcalf* v. *Bruin* (1810), 12 East, 400.

CHAPTER III.

Of Persons who are liable as Partners.

Chap. III. Art. 13.

Persons liable by "holding out."

13. EVERY one who by words spoken or written, or by conduct, represents himself, or who allows himself to be represented, as a partner in a particular firm, is liable as such partner to any one who has on the faith of any such representation given credit to the firm, whether the representation was or was not made or communicated to the particular person so giving credit by or with the knowledge of the apparent partner making or allowing the representation.[1]

This rule a branch of estoppel.

"Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel."[2] The rule is, in fact, nothing else than a special application of the much wider principle of estoppel, which is that if any man has induced another, whether by assertion or by conduct, to believe in and to act upon the

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[1] Cp. I. C. A. 245, 246.

[2] Per Cur., *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. at p. 435.

existence of a particular state of facts, he cannot be heard, as against that other, to deny the truth of those facts.[1] It is therefore immaterial whether there is or is not in fact, or to the knowledge of the creditor, any sharing of profits. And it makes no difference even if the creditor knows of the existence of an agreement between the apparent partners that the party lending his name to the firm shall not have the rights or incur the liabilities of a partner. For his name, if lent upon a private indemnity as between the lender and borrower, is still lent for the very purpose of obtaining credit for the firm on the faith of his being responsible; and the duty of the other partners to indemnify him, so far from being inconsistent with his liability to third persons, is founded on it and assumes it as unqualified.[2]

What amounts to "holding out."

To constitute "holding out" there must be a real lending of the party's credit to the partnership. The use of a man's name without his knowledge cannot make him a partner by estoppel.[3] Also the use of his name must have been made known to the person who seeks to make him liable; otherwise there is no duty towards that person.[4] There may be a "holding out" without any direct communication by words or conduct between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such circumstances that it is likely to be repeated and acted upon by third persons, will be liable to those who afterwards hear of it and act upon it. "If the defendant informs A. B. that

[1] For fuller and more exact statements, see *Carr* v. *London and North Western Railway Company* (1875), L. R. 10 C. P. at pp. 316, 317; Stephen's Digest of the Law of Evidence, Art. 102.

[2] Lindley, i. 48.

[3] *Ib.* 50; *Fox* v. *Clifton* (1830), 6 Bing. 776, 794.

[4] *Ib.*: *Martyn* v. *Gray* (1863), 14 C. B. N. S. 824.

Chap. III. Art. 13.

he is a partner in a commercial establishment, and A. B. informs the plaintiff, and the plaintiff believing the defendant to be a member of the firm supplies goods to them, the defendant is liable for the price." If the party is not named or even if his name is refused, but at the same time such a description is given as sufficiently identifies the person, the result is the same as if his name had been given as a partner.[1]

Doctrine of "holding out" applies to administration in bankruptcy.

The rule as to "holding out" extends to administration in bankruptcy. If two persons trade as partners, and buy goods on their credit as partners, and afterwards both become bankrupt, then, whatever the nature of the real agreement between themselves, the assets of the business must be administered as joint estate for the benefit of the creditors of the supposed firm.[2]

It does not apply to bind a deceased partner's estate.

The doctrine of "holding out" does not extend to bind the estate of a deceased partner where, after his death, the business of the firm is continued in the old name; and whether creditors of the firm know of his death or not is immaterial. "The executor of the deceased incurs no liability by the continued use of the old name."[3]

Liability of retired partners.

A partner who has retired from the firm may be liable on the principle of "holding out" for debts of the firm contracted afterwards, if he has omitted to give notice of his retirement to the creditors. But he cannot be thus liable to a creditor of the firm who did not know him to be a member while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the

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[1] Per Williams, J., *Martyn* v. *Gray* (1863), 14 C. B. N. S. at p. 841.

[2] *Re Rowland and Crankshaw* (1866), 1 Ch. 421; *Ex parte Hayman* (1878), 8 Ch. Div. 11.

[3] Lindley, i. 52, 404.

faith of having his credit to look to.[1] This is the meaning of the saying that "a dormant partner may retire from a firm without giving notice to the world."[2]

Principle of "holding out" not applicable to liability in tort.

There is one reported case[3] in which a retired partner was held liable for damage done by a cart belonging to the firm, on which his name still remained. But to make a man liable in tort as an apparent partner seems to involve confusion of principles. Liability by "holding out" rests on the presumption that credit was given to the firm on the strength of the apparent partner's name. This has no application to causes of action independent of contract: when, as in the case referred to, a carriage is run into by a cart, there can be no question of giving credit to the man whose name is on the cart.

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[1] *Carter* v. *Whalley* (1830), 1 B. & Ad. 11.

[2] *Heath* v. *Sansom* (1832), 4 B. & Ad. 172, 177, per Patteson, J. On the subjects of this and of the preceding paragraph, see further Art. 53 below.

[3] *Stables* v. *Eley* (1825), 1 C. & P. 614. For the true principle, see *Quarman* v. *Burnett* (1840), 6 M. & W. at p. 508, where it is observed that a representation by holding out "can only conclude the defendants with respect to those who have altered their condition on the faith of its being true."

CHAPTER IV.

Of the Liability of Partners for Partnership Debts and the Authority of Partners to bind the Firm.

Chap. IV. Art. 14.

Liability of partners for debts of firm.

14. EVERY partner is liable jointly with the other partners for all debts and obligations incurred while he is a partner and in the usual course of the partnership business by or on behalf of the firm; and after his death his estate is also severally liable for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts.[1]

The individual partner's liability for the dealings of the firm, whether he has himself taken an active part in them or not, is of the same nature as the liability of a principal for the acts of his agent, and is often treated as a species of it.[2] "Each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of all such contracts in the same manner as if entered into personally by himself."[3]

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[1] Altered from I. C. A. 249.

[2] See *Cox* v. *Hickman* (1860), 8 H. L. C. at pp. 304, 312.

[3] Per Tindal, C.J., in *Fox* v. *Clifton* (1830), 6 Bing. at p. 776.

The limitation of the liability to things done in the usual course of business will be presently spoken of under the correlative head of the partner's authority to bind the firm.

The liability not joint and several.

It used to be stated that partnership debts are joint and several; but it has been decided by the House of Lords in *Kendall* v. *Hamilton*[1] that they are joint only, except as to the estate of a deceased partner. The facts of that case were in substance these: A. and B., ostensibly trading in partnership, borrowed money of C., for which C. sued them and obtained judgment, but the judgment was not satisfied. Afterwards C. discovered that D., a solvent person, had been an undisclosed partner with A. and B. at the time of the loan as to the adventure in respect of which it was contracted. The law being settled that a judgment recovered against some of divers joint contractors is, even without satisfaction, a bar to an action against another of them alone, C.'s action was maintainable against D. only if D.'s liability for the loan was several as well as joint. It was held that there was no real authority for the supposed peculiarity of partnership debts as regards living partners; that the several liability of a deceased partner's estate was not an effect of the supposed rule, but a special and somewhat anomalous favour to creditors; and that in this case the debt was not joint and several, and C.'s action was barred.

In the case of a deceased partner's estate it does not matter in what order the partnership creditor pursues his concurrent remedies, provided the two following conditions are substantially satisfied: first, he must not compete with the deceased partner's separate creditors; secondly, the surviving partner must be before the Court.[2]

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[1] 4 App. Ca. 504 (1879).

[2] *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. Div. 177.

Chap. IV. Art. 15.

The rule in *Kendall* v. *Hamilton* does not affect the position of a surety for a partner's debt, for he does not merely stand in the creditor's place as against the principal debtor, but has further distinct rights.[1]

And the rule of course does not affect such liabilities of partners as are on the special facts both joint and several.

For example, where partners have joined in a breach of trust there are separate causes of action as well as a joint one, and a judgment against the partners jointly does not of itself bar subsequent proceedings against their separate estates.[2]

Where judgment has been recovered against one partner, sued in the firm-name, on bills given in the firm-name for the price of goods sold, this judgment, though unsatisfied, is a bar to a subsequent action against the other partner for the price of the goods, the cause of action being substantially the same.[3]

Liabilities of outgoing and incoming partners.

15. A partner who retires from a firm, or the estate of a partner who dies, does not thereby cease to be liable for partnership debts contracted before his retirement or death,[4] and a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner:[5] but a retiring partner may be discharged from any existing liabilities, and an incoming partner may become

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[1] *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, 556.
[2] *Re Davison, Ex parte Chandler* (1884), 13 Q. B. D. 50.
[3] *Cambefort & Co.* v. *Chapman* (1887), 19 Q. B. D. 229.
[4] Lindley, i. 439, 445.
[5] *Ib.* 389; I. C. A. 249.

subject thereto, by an agreement to that effect between the members of the new firm and the creditor.

Such agreement as last aforesaid may be either express or inferred as a fact from the course of dealing between the creditors and the new firm.[1]

Illustrations.

1. A., B. and C. are partners. D. is a creditor of the firm. A. retires from the firm, and B. and C., either alone or together with a new partner, E., take upon themselves the liabilities of the old firm. This alone does not affect D.'s right to obtain payment from A., B. and C., or A.'s liability to D.

2. A partnership firm, consisting of A., B. and C., enters into a continuing contract with D., which is to run over a period of three years. After one year A. retires from the firm, taking a covenant from B. and C. to indemnify him against all liabilities under the contract. D. knows of A.'s retirement. A. remains liable to D. under the contract, and is bound by everything duly done under it by B. and C. after his retirement from the firm.[2]

3. A., B. and C. are bankers in partnership. A. dies, and B. and C. continue the business. D., E. and F., customers of the bank at the time of A.'s death, continue to deal with the bank in the usual way after they know of A.'s death. The firm afterwards becomes insolvent. A.'s estate remains liable to D., E. and F. for the balances due to them respectively at the time of A.'s death, less any sums subsequently drawn out.[3]

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[1] Lindley, i. 443.

[2] *Oakford* v. *European and American Steam Shipping Company* (1863), 1 H. & M. 182, 191. See also *Swire* v. *Redman* (1876), 1 Q. B. D. 536.

[3] *Devaynes* v. *Noble, Sleech's Case* (1816), 1 Mer. 539, 569; *Clayton's Case* (1816), *ib.* 572, 604.

In the last case put, one customer, D., discovers that securities held by the bank for him have been sold without his authority in A.'s lifetime. Here A.'s estate is not discharged from being liable to make good the loss, for the additional reason that D. could not elect to discharge it from this particular liability before he knew of the wrongful sale.[1]

4. A. and B. are bankers in partnership. C. and D. are admitted as new partners, of which notice is given by circular to all the customers of the bank. A short time afterwards A. dies. Two years later B. dies, and the business is still continued under the same firm. The bank gets into difficulties, and at last stops payment. Depositors in the bank whose deposits were prior to A.'s death, and who knew of his death, and continued to receive interest on their deposits from the new partners, and have proved in the bankruptcy of C. and D. for the amount of their deposits, cannot now claim against A.'s estate, for their conduct amounts to an acceptance of the liability of the new partners alone.[2]

5. A. and B. are partners. F. is a creditor of the firm. A. and B. take C. into partnership. C. brings in no capital. The assets and liabilities of the old firm are, by the consent of all the partners—but without any express provision in the new deed of partnership—transferred to and assumed by the new firm. The accounts are continued in the old books as if no change had taken place, and existing liabilities, including a portion of F.'s debt, are paid indiscriminately out of the blended assets of the old and the new firm. F. continues his dealings with the new firm on the same footing as with the old, knowing of the change and treating the partners in the new firm as his debtors. The new firm of A., B. and C. is liable to F.[3]

6. A. and B. are partners. A. retires, and B. takes C. into partnership, continuing the old firm-name. A customer who deals with the firm after this change, and without notice of it, may sue at his election A. and B., or B. and C., but he cannot sue A., B. and C. jointly, nor sue A. after suing B. and C.[4]

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[1] *Clayton's Case* (1816), 1 Mer. 579.
[2] *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255.
[3] *Rolfe* v. *Flower* (1865), L. R. 1 P. C. 27.
[4] *Scarf* v. *Jardine* (1882), (H. L.) 7 App. Ca. 345.

To determine whether an incoming partner has become liable to an existing creditor of the firm, two questions have to be considered:—

Test of liability of new firm.

1st. Whether the new firm has assumed the liability to pay the debt.

2nd. Whether the creditor has agreed to accept the new firm as his debtors, and to discharge the old partnership from its liability.[1]

Novation.

Novation is the technical name for the contract of substituted liability, which is, of course, not confined to cases of partnership. As between the incoming partner and the creditor, the consideration for the undertaking of the liability is the change of the creditor's existing rights.

Mere agreement between partners cannot operate as novation.

An agreement between the old partners and the incoming partner that he shall be liable for existing debts will not of itself give the creditors of the firm any right against him; for it is a general rule that not even the express intention of the parties to a contract can enable a third person for whose benefit it was made to enforce it.[2] An incoming partner is liable, however, for new debts arising out of a continuing contract made by the firm before he joined it; as where the old firm had given a continuing order for the supply of a particular kind of goods.[3]

There is in law nothing to prevent a firm from stipulating with any creditor from the beginning that he shall look only to the members of the firm for the time being; the term *novation*, however, is not properly applicable to such a case.[4]

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[1] *Rolfe* v. *Flower* (1865), L. R. 1 P. C. at p. 38.

[2] Principles of Contract, 201.

[3] Lindley, i. 391.

[4] This is involved in *Hort's Case* and *Grain's Case* (1875), 1 Ch.

Chap. IV. Art. 16.

Power of partner to bind the firm.

16. Each partner who does any act necessary for or usually done in carrying on business of the kind carried on by the firm of which he is a member, binds his partners to the same extent as if he were their agent duly appointed for that purpose;[1] unless he has in fact no authority to act for the firm in the particular matter, and is not known to the person with whom he is dealing to be a partner.[2]

"Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes."[3]

"Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership."[4]

Except where

The exception in the event of the partner having no

Div. 307, where the deed of settlement of an insurance company contained a power to transfer the business and liabilities, and a transfer made under that power was decided to be binding on the policy holders. As to the misuse of the term *novation*, see per James, L. J., at p. 322.

[1] Slightly altered from I. C. A. 251; see Lindley, i. 236.

[2] Lindley, i. 237.

[3] Lord Westbury in *Ex parte Darlington, &c. Banking Co.* (1864), 4 D. J. S. 581, 585.

[4] James, L. J., in *Baird's Case* (1870), 5 Ch. at p. 733.

authority, and also not appearing to the other party to have it, is not established by any direct decision. But it was said in a recent case by Cleasby, B., that partnership does not always, and especially does not in these circumstances, imply mutual agency.

he has neither apparent nor real authority.

"In the common case of a partnership, where by the terms of the partnership all the capital is supplied by A., and the business is to be carried on by B. and C., in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management; that he shall neither buy nor sell, nor draw nor accept bills; no one would say that as among themselves there was any agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his co-partners, but in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them."[1]

What kind of acts in general bind the firm.

The acts of a partner done in the name of a firm will not bind the firm merely because they are convenient, or prudent, or even necessary for the particular occasion. The question is, what is necessary for the usual conduct of the partnership business; that is the limit of each partner's general authority: he is the general agent of the firm, but he is no more. "A power to do what is usual does not include a power to do what is unusual, however urgent."[2]

Whether a particular act is "necessary to the transaction of a business in the way in which it is usually carried on" is a question "to be determined by the nature

[1] Cleasby, B., in *Holme* v. *Hammond* (1872), L. R. 7 Ex. at p. 233.

[2] Lindley, i. 238.

Chap. IV. Art. 17.

of the business, and by the practice of persons engaged in it."[1] This must once have been a question of fact in all cases, as it still would be in a new case. But as to a certain number of frequent and important transactions, there are well understood usages extending to all trading partnerships, and now constantly recognized by the Court; these have become in effect rules of law, and it seems best to give them as such, and this we proceed to do. In other words, there are many kinds of business in which it is so notoriously needful or useful to issue negotiable instruments, borrow money, and so following, in the ordinary course of affairs, that the existence or validity of the usage is no longer a question of fact. But there is no authoritative list or definition of the kinds of business which are "trades" in this sense. Thus it is hardly possible to frame a statement which shall be quite satisfactory in form.

Implied authority of partners in trade as to certain transactions.

17. Subject to the limitations expressed in the three next following articles, every partner may bind the firm by any of the following acts:

a. He may sell any goods or personal chattels of the firm.

b. He may purchase on account of the firm any goods of a kind necessary for or usually employed in the business carried on by it.

c. He may receive payment of debts due to the firm, and give receipts or releases for them.

d. He may engage servants for the partnership business.

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[1] Lindley, i. 239.

If the partnership is in trade, every partner may also bind the firm by any of the following acts:

e. He may accept, make, and issue bills and other negotiable instruments in the name of the firm.[1]

f. He may borrow money on the credit of the firm.

g. He may for that purpose pledge any goods or personal chattels belonging to the firm.

h. He may [probably] for the like purpose make an equitable mortgage by deposit of deeds or otherwise of real estate or chattels real belonging to the firm.

The general powers of partners as agents of the firm are summed up by Story in a passage which has been adopted by the Judicial Committee of the Privy Council:[2]—

"Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *præpositus negotiis societatis*, and may consequently bind all the other partners by his

[1] Cp. the Bills of Exchange Act, 1882, s. 23, and Chalmers' Digest of the Law of Bills of Exchange, 3rd ed., p. 59 *sqq*. Where the firm name is also the name of an individual member of the firm who does not carry on any separate business, a bill of exchange, drawn, accepted, or indorsed in that name is presumed to be a partnership bill, and if the other partners are sued on it the burthen of proof is on them to show that the name was signed as that of the individual partner and not as that of the firm: *Yorkshire Banking Co.* v. *Beatson* (1880), 5 C. P. Div. 109, 121.

[2] Story on Agency, § 124; *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. at p. 193.

Chap. IV. Art. 17.

acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques and other negotiable paper in the name and on account of the partnership."

The particular transactions in which the power of a partner to bind the firm has been called in question, and either upheld or disallowed, are exhaustively considered by Lord Justice Lindley (i. 264—297). A certain number of the leading heads may here be selected by way of illustration. The distinction between the powers of partners in trading and non-trading firms is perhaps not quite clear on the authorities, but it is believed that the existing practice and understanding are correctly represented by the statement in the text.

Authority to bind the Firm implied.

Negotiable instruments.

The power of binding the firm by negotiable instruments is one of the most frequent and important.

In trading partnerships every partner has this power unless specially restrained by agreement.[1] In the case of a non-trading partnership those who seek to hold the firm bound must prove that such a course of dealing is necessary or usual in the particular business. In the case, again, of

Exception as

[1] Lindley, i. 266, *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. at p. 194; *Ex parte Darlington, &c. Banking Company* (1864), 4 D. J. S. at p. 585. Brokers and commission agents are not traders within the meaning of this rule, *Yates* v. *Dalton* (1858), 28 L. J. Ex. 69.

to directors of numerous associations.

an association "too numerous to act in the way that an ordinary partnership does,"[1] whose affairs are under the exclusive management of a small number of its members—in other words, an unincorporated company—the presumption of authority does not exist either for this purpose or in the other cases where partners have in general an implied authority; for the ordinary authority of a partner is founded on the mutual confidence involved, in ordinary cases, in the contract of partnership; and this confidence is excluded when the members of the association are personally unknown to one another.

In such a case those who are mere shareholders have no power at all to bind the rest, and the directors or managing members have no more than has been conferred on them expressly or by necessary implication in the constitution of the particular society.[2] But since the Companies Acts this rule is not likely to have much practical application.

It seems indeed a not untenable suggestion that the fixing of the number of twenty by the Companies Act, 1862, as the superior limit of an ordinary partnership must be taken as a legislative declaration that no smaller number can be considered "too numerous to act in the way that an ordinary partnership does." The general aim and policy of the Act, it might be urged, was to leave no middle term between an ordinary partnership and a company regularly formed under the Act. In point of fact, however, associations of seven or more persons who do not mean to act as partners in the ordinary sense will almost always seek to be registered as limited companies; and the question here started is perhaps merely curious.

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[1] 3 D. M. G. 477 (1854).

[2] *Dickinson* v. *Valpy* (1829), 10 B. & C. 128, and other authorities referred to in Lindley, i. 267; Principles of Contract, 129.

Chap. IV. Art. 17.

Borrowing money.

Every partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm.[1] The directors of a numerous association, according to the rule above explained, have no such authority beyond what may have been specially committed to them.[2]

Sale and pledge of partnership property.

Every partner has implied authority to dispose, either by way of sale or (where he has power to borrow on the credit of the firm) by way of pledge, of any part of the goods or personal property belonging to the partnership,[3] unless it is known to the lender or purchaser that it is the intention of the partner offering to dispose of partnership property to apply the proceeds to his own use instead of accounting for them to the firm.[4]

A partner having power to borrow on the credit of the firm may probably give a valid equitable security, by deposit of deeds or otherwise, over any real estate of the partnership.[5]

But a legal conveyance, whether by way of mortgage or otherwise, of real estate or chattels real of the firm, cannot be given except by all the partners, or with their express authority given by deed.[5]

Purchase.

A partner may buy on the credit of the firm any goods of a kind used in its business, and the firm will be bound, notwithstanding any subsequent misapplication of them by that partner.[6] This power extends to non-trading partnerships.[7]

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[1] *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. 152, 194.
[2] *Burmester* v. *Norris* (1851), 6 Ex. 796; 21 L. J. Exch. 43.
[3] Lindley, i. 295.
[4] *Ex parte Bonbonus* (1803), 8 Ves. 540.
[5] Lindley, i. 278, 284.
[6] *Bond* v. *Gibson* (1808), 1 Camp. 185.
[7] Lindley, i. 291.

Payment to one partner is a good payment to the firm,[1] and by parity of reason a release by one partner binds the firm, "because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment."[2]

Payment to and release by one partner.

"One partner has implied authority to hire servants to perform the business of the partnership," and probably also to discharge them if the other partners do not object.[3]

Servants.

Authority to bind the Firm not implied.

One partner cannot bind the others by deed without express authority (which must itself be under seal),[4] and where the partnership articles are under seal, the fact of their being so does not of itself confer any authority for this purpose.[5]

Deeds.

One partner cannot bind the others by giving a guaranty in the name of the firm, even if the act is in itself a reasonable and convenient one for effecting the purposes of the partnership business, unless such is the usage of that particular firm, or the general usage of other firms engaged in the like business:[6] in other words, there is no general implied authority for one partner to bind the firm by guaranty, but agreement may confer such authority as to a particular firm, or custom as to all firms engaged in a particular business. In the latter case, however, the force of the custom really depends on a presumed agreement among the partners that the business shall be conducted in the usual and customary manner.

Guaranties.

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[1] Lindley, i. 275.
[2] Best, C. J., in *Stead* v. *Salt* (1825), 3 Bing. at p. 103.
[3] Lindley, i. 296.
[4] *Steiglitz* v. *Egginton* (1815), Holt, N. P. 141.
[5] *Harrison* v. *Jackson* (1797), 7 T. R. 207.
[6] *Brettel* v. *Williams* (1849), 4 Ex. 623; 19 L. J. Ex. 121.

Chap. IV. Art. 17a.

It is not competent to one member of a partnership to bind the firm by a submission to arbitration.[1]

Submission to arbitration.

Limited power of managers in numerous partnerships.

[**17a.** Where the members of a partnership are too numerous to act as partners in the ordinary way, and it is provided by the constitution of the partnership that its affairs shall be conducted and controlled only by a limited number of its members (hereinafter called directors), there no members of the partnership, not being directors, can bind the others by their acts, and the directors can bind the others only within the scope of the authority conferred on them expressly or by necessary implication in the constitution of the partnership.[2]]

Apart from the Companies Acts, this is undoubted law; but, as above suggested, it is perhaps doubtful whether an association of this kind would now be recognized as differing in any respect from an ordinary partnership.

Partner using credit of firm for private purposes.

18. Where one partner pledges the credit of the firm for a purpose apparently not connected with the partnership affairs, whether the transaction itself is or is not of a class within his apparent general authority, the firm is not bound, unless he is in fact specially authorized by the other partners [or, perhaps, unless the party dealing with him had reasonable ground for believing him to be so authorized.]

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[1] *Stead* v. *Salt* (1825), 3 Bing. 101.

[2] See Note 2, p. 41, above.

The passage already partly cited from Story (Art. 17, p. 39, above) continues as follows:

"The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and therefore his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of or co-operates in such breach of duty."[1]

Persons who "have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it,"[2] cannot say that they were misled by his apparent general authority. For his authority presumably exists for the benefit and for the purposes of the firm, not for those of its individual members. The commonest case, indeed the only case at all common, to which this principle has to be applied, is that of one partner giving negotiable instruments or other security in the name of the firm to raise money (to the knowledge of the person advancing it) for his private purposes or for the satisfaction of his private debt.[3]

"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is

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[1] Story on Agency, § 125; *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. at p. 194.

[2] *Ex parte Darlington, &c. Banking Co.* (1864), 4 D. J. S. at p. 585.

[3] See the cases referred to in the next note, and *Heilbut* v. *Nevill* (1869—70), L. R. 4 C. P. 354, in Ex. Ch. 5 C. P. 478.

Chap. IV. Art. 18.

incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so."[1]

"If a person lends money to a partner for purposes for which he has no authority to borrow it on behalf of the partnership, the lender having notice of that want of authority cannot sue the firm."[2]

"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency; and express authority therefore is necessary from the other partner to warrant that payment."[3]

Whether the creditor may be entitled as against the firm by reasonable belief in the partner's authority.

It is doubtful whether a separate creditor thus taking partnership securities or funds from one partner is justified even by having reasonable cause to believe in the existence of a special authority; the opinion has been expressed by Cockburn, C. J., that he deals with him altogether at his own peril.[4] But it may happen that the other partner whom the separate creditor seeks to bind has so conducted himself as to give reasonable ground for supposing there is authority; and where he has done so, he may be bound

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[1] Smith, Merc. Law, 43 (9th ed.), adopted by Keating and Byles, JJ., in *Levieson* v. *Lane* (1862), 13 C. B. N. S. 278; 32 L. J. C. P. 10; by Lord Westbury, in *Ex parte Darlington, &c. Banking Co.* (1864), 4 D. J. S. at p. 585; and by Cockburn, C.J. (subject to a doubt as to the last words, see below), in *Kendal* v. *Wood* (1871), (Ex. Ch.) L. R. 6 Ex. at p. 248.

[2] *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. at p. 196.

[3] Montague Smith, J., in *Kendal* v. *Wood* (1871), L. R. 6 Ex. at p. 253.

[4] L. R. 6 Ex. 248.

on the general principle of estoppel. The rule is stated with this qualification or warning by Blackburn, J., and Montague Smith, J.[1]

Instances of the general rule.

Another special application of the foregoing rule was made in a case where two out of three partners gave an acceptance in the name of the firm for a debt incurred before the third had entered the partnership. This was held not to bind the new partner, for it was in effect the same thing as an attempt by a single partner to pledge the joint fund for his individual debts.[2]

Again, if a customer of a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him, for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement, and incurs no obligation in respect of any business done in pursuance of it.[3]

The same principle applies to the rights of persons taking negotiable instruments indorsed in the name of the firm. Where a partner authorized to indorse bills in the partnership name and for partnership purposes indorses a bill in the name of the firm for his own private purposes, a holder who takes the bill, not knowing the indorsement to be for a purpose foreign to the partnership, can still recover against the other partners, notwithstanding the unauthorized character of the indorsement as between the partners;[4] but if he knows that the indorsement is in fact not for a partnership purpose he cannot recover.[5]

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[1] L. R. 6 Ex. at pp. 251, 253.

[2] *Shirreff* v. *Wilks* (1800), 1 East, 48; see per Le Blanc, J.

[3] *Bignold* v. *Waterhouse* (1813), 1 M. & S. 255.

[4] *Lewis* v. *Reilly* (1841), 1 Q. B. 349.

[5] *Garland* v. *Jacomb* (1873), (Ex. Ch.) L. R. 8 Ex. 216.

Chap. IV. Art. 19.

Effect of notification that firm will not be bound by acts of partner.

19. All or any of the partners in a firm may give notice that the firm will not be bound by acts, or by some class of acts, done in the name of the firm by any one or more of the partners; and if such partner or partners as last aforesaid deal in the name of the firm in any matter comprised in the notice with any person to whose knowledge the notice has come, the firm is not bound thereby.

Restrictive agreement inoperative if not notified.

It is clear law that if partners agree between themselves that the apparent authority of one or more of them shall be restricted, such an agreement is inoperative against persons having no notice of it.

"Where two or more persons are engaged as partners in an ordinary trade each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. . . . Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern."[1]

Effect of notice: *semble*, there must be a distinct *warning*.

There are dicta to the effect that a creditor who deals with a partner as agent of the firm, having notice of a restrictive stipulation among the partners themselves, cannot hold the firm bound;[2] and this view is adopted in

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[1] Lord Cranworth, in *Cox* v. *Hickman* (1860), 8 H. L. C. at p. 304.

[2] *Lord Gallway* v. *Mathew* (1808), 10 East, 264; *Alderson* v. *Pope*, 1 Camp. 404, *n.*

the Indian Contract Act, which enacts (s. 251, Exception) that

"If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement."

But it is contested by Lord Justice Lindley, who points out that an agreement between the partners that certain things shall not be done is quite consistent with an intention that if they are done the firm shall nevertheless be answerable. All that the agreement necessarily means is that the transgressing partner shall indemnify the firm, not that the firm shall not be liable. There should be not merely a restriction of authority as between the partners, but a distinct warning to third persons dealing with the firm that if the forbidden acts are done the firm will not answer for them. If a partner tells a third person that he has ceased to be a partner, but his name is to continue in the firm for a certain time, this is not a disclaimer of responsibility, but means that he will be responsible for the debts of the firm contracted during the specified time;[1] and the cases seem closely parallel. The undoubted proposition that no agreement among partners, whether known or not to third persons, can avail to limit the amount of their liability for the debts of the firm, is also to some extent analogous.[2] The rule has been stated in the text above in a form intended to express Lord Justice Lindley's opinion.

20. An admission made by one partner concerning the partnership affairs is relevant

Admissions and representations of partners.

[1] *Brown* v. *Leonard* (1820), 2 Chitty, 120.

[2] Lindley, i. 332.

Chap. IV. Art. 21.

against the firm, and a representation made by one partner to any person concerning the partnership affairs has the same effect as against the firm, and so far as concerns the civil rights and liabilities of the partners, as if it had been made by all the partners.[1]

Explanation.—This does not apply to a representation made by one partner as to the extent of his own authority to bind the firm.[2]

An admission made by a partner, though relevant against the firm, is of course not conclusive;[3] for an admission is not conclusive against the person actually making it. A definition of the term *admission*, and references to authorities on this subject, will be found in Mr. Justice Stephen's Digest of the Law of Evidence, Art. 15. Representations, however, may be conclusive by way of estoppel, or under some of the rules of equity which are in truth akin to the legal doctrine of estoppel, and rest on the same principle.

The qualification of the rule above given by way of explanation is advisedly so given, as not being a real exception. Its necessity is obvious, for otherwise one partner could bind the firm to anything whatever by merely representing himself as authorized to do so.

21. Notice to one [acting?] partner of any matter relating to partnership affairs is notice to the firm, except in the case of a fraud upon

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[1] *Wickham* v. *Wickham* (1855), 2 K. & J. 478, 491.

[2] *Ex parte Agace* (1792), 2 Cox, 312.

[3] *Stead* v. *Salt* (1825), 3 Bing. at p. 103.

the firm committed by or with the consent of that partner.[1]

It is doubtful whether a firm is to be deemed to have notice of facts known to a partner before he became a member of the firm.[2]

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[1] Lindley, i. 287; Jessel, M. R., in *Williamson* v. *Barbour* (1877), 9 Ch. D. at p. 535; cp. *Lacey* v. *Hill* (1876), 4 Ch. Div. at p. 549.

[2] Jessel, M. R., *ubi sup.*:—"It has not, so far as I know, been held that notice to a man who afterwards becomes a partner is notice to the firm. It might be so held."

CHAPTER V.

Of the Liability of Partners for Wrongs.

Chap. V. Art. 22.

Liability of partners for wrongs.

22. EVERY partner is liable jointly with his fellow-partners, and also severally, for all sums and damages which the firm, while he is a partner therein, becomes liable for under either of the two next following articles.[1]

The cases in question are, as will immediately appear, those where a fraud or wrong is committed by one partner in the course of the business of the firm. It has once been held that in a suit to recover from one partner money which had been misapplied by another all the partners were necessary parties;[2] but this appears to have been a solitary and unconsidered decision, and it has since been expressly dissented from.[3]

Fraud, &c. in conduct of partnership business.

23. Where loss or injury is caused to third persons, or penalties incurred, by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, the firm is liable therefor to the same extent as the partner so acting or omitting to act.[4]

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[1] Lindley, i. 373.
[2] *Atkinson* v. *Mackreth* (1866), 2 Eq. 570.
[3] *Plumer* v. *Gregory* (1874), 18 Eq. 621, 627.
[4] Lindley, i. 298.

Explanation.—For this purpose partner includes an agent or servant of the firm.

Misapplication of money or property received for or in custody of the firm.

24. Where any money or property of a third person is received by one partner, acting within the scope of his ordinary apparent authority in partnership affairs, and is misapplied by that partner,[1] and where any money or property of a third person being as such in the custody of the firm is misapplied by any partner,[2] the firm is liable to make good the loss.

Explanation.—Money is deemed to be in the custody of the firm when it has been paid to any agent of the firm, or paid or credited to the account of the firm with any person, in the ordinary course of business, or under such circumstances that a partner using ordinary diligence in the partnership affairs would be aware of such payment or transaction.[3]

Illustrations.

1. A., B. and C. are partners in a bank, C. taking no active part in the business. D., a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by A. and B. without D.'s authority. The value of the securities is a partnership debt for which the firm is

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[1] *Blair* v. *Bromley* (1847), 2 Ph. 354.

[2] *St. Aubyn* v. *Smart* (1868), 3 Ch. 646; *Plumer* v. *Gregory* (1874), 18 Eq. 621.

[3] *Marsh* v. *Keating* (1834), 2 Cl. & F. 250, 289. It may be doubted whether this explanation is really necessary. See note on this case, p. 56, below.

liable to D.; and C. or his estate is liable whether he knew of the sale or not.[1]

2. A. and B. are solicitors in partnership. C., a client of the firm, hands a sum of money to A. to be invested on a specific security. A. never invests it, but applies it to his own use. B. receives no part of the money, and knows nothing of the transaction. B. is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors.[2]

3. If, the other facts being as in the last illustration, C. had given the money to A. with general directions to invest it for him, B. would not be liable, since it is no part of the ordinary business of solicitors to receive money to be invested at their discretion.[3]

4. J. and W. are in partnership as solicitors. P. pays £1,300 to J. and W. to be invested on a mortgage of specified real estate, and they jointly acknowledge the receipt of it for that purpose. Afterwards P. hands over £1,700 to W. on his representation that it will be invested on a mortgage of some real estate of F., another client of the firm, such estate not being specifically described. J. dies, and afterwards both these sums are fraudulently applied to his own use by W. W. dies, having paid interest to P. on the two sums till within a short time before his death, and his estate is insolvent. J.'s estate is liable to make good to P. the £1,300, with interest from the date when interest was last paid by W., but not the £1,700.[4]

5. A. and B., solicitors in partnership, have by the direction of C., a client, invested money for him on a mortgage, and have from time to time received the interest for him. A. receives the principal money without directions from C., and without the knowledge of B., and misapplies it. B. is not liable, as it was no part of the firm's business to receive the principal money; but if the money when repaid had been

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[1] *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. at pp. 572, 579.

[2] *Blair* v. *Bromley* (1847), 2 Ph. 354.

[3] *Harman* v. *Johnson* (1853), 2 E. & B. 61; 22 L. J. Q. B. 297.

[4] *Plumer* v. *Gregory* (1874), 18 Eq. 621.

passed through the account of the firm, B. would probably be liable.[1]

6. A., one of the partners in a banking firm, advises B., a customer, to sell certain securities of B.'s which are in the custody of the bank, and to invest the proceeds in another security to be provided by A. B. sells out by the agency of the bank in the usual way, and gives A. a cheque for the money, which he receives and misapplies without the knowledge of the other partners. The firm is not liable to make good the loss to B., as it is not part of the ordinary business of bankers to receive money generally for investment.[2]

7. A customer of a banking firm buys stock through the agency of the firm, which is transferred to A., one of the partners, in pursuance of an arrangement between the partners, and with the customer's knowledge and assent, but not at his request. A. sells out this stock without authority, and the proceeds are received by the firm. The firm is liable to make good the loss.[3]

8. A customer of a banking firm deposits with the firm a box containing securities. He afterwards authorizes one of the partners to take out some of these and replace them by certain others. That partner not only makes the changes he is authorized to make in the contents of the box, but makes other changes without authority, and converts the customer's securities to his own use. The firm is not liable to make good the loss, as the separate authority given to one partner by the customer shows that he elected to deal with that partner alone and not as agent of the firm.[4]

9. A., one of the partners in a bank under the firm of M. and Co., forges a power of attorney from B., a customer of the bank, to himself and the other partners, and thereby procures a transfer of stock standing in B.'s name at the Bank

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[1] *Sims* v. *Brutton* (1850), 5 Ex. 802; 20 L. J. Exch. 41, as corrected by Lord Justice Lindley's criticism, i. 309; cp. *Cleather* v. *Twisden* (1883), 24 Ch. D. 731; *Cooper* v. *Prichard* (1883), 11 Q. B. Div. 351.

[2] *Bishop* v. *Countess of Jersey* (1854), 2 Drew. 143.

[3] *Devaynes* v. *Noble, Baring's Case* (1816), 1 Mer. at pp. 611, 614.

[4] *Ex parte Eyre* (1842), 1 Ph. 227; cp. the remark of James, V.-C., 7 Eq. 516 (1869).

Chap. V. Art. 24.

of England. The proceeds of the stock are credited to M. and Co. in their pass-book with another bank, but there is no entry of the transaction in M. and Co.'s own books. The other partners in the firm of M. and Co. are liable to B., because it is part of the ordinary business of bankers "to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds" [and because they might by the use of ordinary diligence have known of the payment and from what source it came].[1]

10. W. and J. are solicitors in partnership. A., B. and C., clients of the firm, have left moneys representing a fund in which they are interested in the hands of the firm for investment. After some delay a mortgage made to W. alone is, with the consent of A., B. and C., appropriated as a security for this fund. W. realizes the security, and misapplies the money without the knowledge of J. The firm is not liable, as A., B. and C. dealt with W. not as solicitor but as trustee, and the breach of duty did not happen while the money was in the hands of the firm.[2] But if there were facts showing that A., B. and C. dealt with W. as a member of the firm, and the matter of the investment was treated as the business of the firm, the firm would be liable.[3]

Ground of liability.

The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground "that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted

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[1] *Marsh* v. *Keating* (1834), 2 Cl. & F. 250, 289; see Lord Justice Lindley's note, i. 312, from which the words in quotation marks are taken. If his comment is right, as it clearly is, one can hardly see what the knowledge or means of knowledge of the partners had to do with it; but the point is treated as material in the opinion of the judges. The truth is that the rule as above given, by which the ordinary course of business is the primary test of the firm's liability, was developed only by later decisions.

[2] *Coomer* v. *Bromley* (1852), 5 De G. & Sm. 532; and see a fuller account of the case in Lindley, i. 310.

[3] *Cleather* v. *Twisden* (1883), 24 Ch. D. 731.

with it without their authority;"[1] or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members "held him out to the world as a person for whom they were responsible."[2]

General test on principle of agency.

The rule given in Art. 23 is in fact only a special case of the wider rule to the same effect which is one of the most familiar and important parts of the law of agency. The question is always whether the wrong-doer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorized act of his agent in a like case. The proposition that a principal is not liable for the wilful trespass or wrong of his agent is for most purposes sufficiently correct; but a more exact statement of the rule would be that the principal is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not. On the one hand, the principal may be liable for a manifest and wilful wrong if committed by the agent in the course of his employment, and for the purpose of serving the principal's interest in the matter in hand;[3] he is also liable for trespass committed by the agent under a mistake of fact, such that, if the facts had been as the agent supposed, the act done would have been not only lawful in itself, but within the scope of his lawful authority:[4] on

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[1] Lindley, i. 306.

[2] Per James, V.-C., in *Earl of Dundonald* v. *Masterman* (1869), 7 Eq. at p. 517.

[3] *Limpus* v. *General Omnibus Co.* (Ex. Ch. 1862), 1 H. & C. 526.

[4] *Bayley* v. *Manchester, &c. Railway Co.* (Ex. Ch. 1873), L. R. 8 C. P. 148.

Chap. V. Art. 25.

the other hand, he is not liable for acts outside the agent's employment, though done in good faith and with a view to serve the principal's interest.[1]

Special cases of misapplication of client's money by one partner.

Cases to which it has been sought, with or without success, to apply the principle stated in Art. 24 have generally arisen in the following manner. Some client of a firm of solicitors or bankers, reposing special confidence in one member of the firm, has intrusted him with money for investment: this has sometimes appeared in a regular course in the accounts of the firm, sometimes not. Then the money has been misapplied by the particular partner in question. When it is sought to charge the firm with making it good, it becomes important to determine whether the original transaction with the defaulting partner was in fact a partnership transaction, and if it was so, whether the duty of the firm was not determined before the default. The illustrations above given will show better than any further comments of a general kind how these questions are dealt with in practice.

Improper employment of trust

25. If a partner, being a trustee, improperly employs trust moneys in the business or on the

[1] *Poulton* v. *L. & S. W. R. Co.* (1867), L. R. 2 Q. B. 534; *Allen* v. *L. & S. W. R. Co.* (1870), L. R. 6 Q. B. 65; *Bolingbroke* v. *Swindon Local Board* (1874), L. R. 9 C. P. 575. It is by no means easy to assign the true ground of an employer's liability for his servant's unauthorized or even forbidden acts and defaults. Perhaps the master's duty is best understood if regarded not as arising from the relation of principal and agent, but as a general duty to see that his business is conducted with reasonable care for the safety of other people, analogous to the duty imposed on owners of real property to keep it in a safe condition as regards persons lawfully passing on the highway, or coming on the property itself by the owner's invitation. This view, which I have endeavoured elsewhere to defend, has more distinct countenance from both English and American authority than might be expected. But the subject is too large to dwell upon here.

account of the partnership, no other partner is liable therefor to the persons beneficially interested,[1] unless he either knew of the breach of trust or with reasonable diligence might have known it.

moneys for partnership purposes.

In either of the last-mentioned cases the partners having such knowledge or means of knowledge as aforesaid are jointly and severally liable for the breach of trust.[2]

Liability of partners for breach of trust by one not really a partnership liability.

This article is inserted here for convenience, but does not properly belong to the law of partnership. For, since only those partners are liable who are personally implicated in the breach of trust by their own knowledge or culpable ignorance, it can hardly be said that the firm is liable, or that the individual partners are liable as partners. They are only joint wrong-doers, to whom the fact of their being in partnership has furnished an occasion of wrong-doing. The case is not really analogous to that of money being received in a usual course on the credit of the partnership and misapplied: as may be seen by putting the stronger case of all the partners robbing a customer in the shop, or cheating him in some matter unconnected with the business, and crediting the firm with the money taken from him. Here it is obvious that the relation of partnership is not a material element in the resulting liability. Something will be said in another place, however (on Art. 62,

[1] We still want a convenient term of art to replace the harsh and cumbrous *cestui que trust*. *Trustor* was long ago suggested by Mr. Humphreys, but it has not found favour, perhaps because it might be taken for the creator of the trust rather than the person having the benefit of it. The Indian Trusts Act has adopted "beneficiary."

[2] Lindley, i. 311.

Chap. V. Art. 25.

below), of a special kind of claims against partners as trustees or executors of a deceased partner which have often raised difficult and complicated questions.

Compare the Indian Trusts Act, 1882, s. 67: "If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust." By the interpretation clause, s. 3, "a person is said to have notice of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, s. 229" (*i. e.* in the course of the business transacted by him for the principal).

CHAPTER VI.

Of the Relations of Partners to One Another.

Terms of partnership may be varied only by consent of all partners.

26. WHERE the mutual rights and duties of partners have been determined by a special contract between them, the contract may be rescinded or varied by the consent of all the partners, but not otherwise.

Such consent may either be expressed or inferred from an uniform course of dealing.[1]

Illustrations.

1. It is agreed between partners that no one of them shall draw or accept bills in his own name without the concurrence of the others. Afterwards they habitually permit one of

[1] Slightly altered from I. C. A. 252; *Const* v. *Harris* (1824), Turn. & R. 496, 517; Lindley, ii. 820. "With respect to a partnership agreement, it is to be observed, that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business: when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners": Lord Langdale, M.R., in *England* v. *Curling* (1844), 8 Beav. 129, 133.

Chap. VI. Art. 27.

them to draw and accept bills in the name of the firm without such concurrence. This course of dealing shows a common consent to vary the terms of the original contract in that respect.[1]

2. Articles of partnership provide that a valuation of the partnership property shall be made on the annual account day for the purpose of settling the partnership accounts. The valuation is constantly made in a particular way for the space of many years, and acted upon by all the partners for the time being. The mode of valuation thus adopted cannot after this course of dealing be disputed by any partner or his representatives, though no particular mode of valuation is prescribed by the partnership events, or even if the mode adopted is inconsistent with the terms of the articles.[2]

3. It is the practice of a firm, when debts are discovered to be bad, to debit them to the profit and loss account of the current year, without regard to the year in which they may have been reckoned as assets. A partner dies, and after the accounts have been made up for the last year of his interest in the firm, it is discovered that some of the supposed assets of that year are bad. His executors are entitled to be paid the amount appearing to stand to his credit on the last account day, without any deduction for the subsequently discovered loss.[3]

Variations when assented to binding on partner's representatives.

It is an obvious corollary of the rule here set forth that persons claiming an interest in partnership property as representatives or assignees of any partner who has assented expressly or tacitly to a variation of the original terms of partnership are bound by his assent, and have no ground to complain of those terms having been departed from.[4]

Partnership property.

27. The partners in any firm are owners in common [or joint owners without benefit of

[1] Lord Eldon in *Const* v. *Harris* (1824), Turn. & R. at p. 523.
[2] *Coventry* v. *Barclay* (1864), 3 D. J. S. 320.
[3] *Ex parte Barber* (1870), 5 Ch. 687.
[4] *Const* v. *Harris* (1824), Turn. & R. at p. 524.

survivorship?] of all property and valuable interests originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business. Such property and interests are called partnership property.[1]

Explanation.—The legal estate in land which is partnership property is held and devolves according to the general rules of the law of real property, but in trust, so far as necessary, for the persons beneficially interested in such land under this article.[2]

Exception.—Where co-owners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of the land, and purchase other land out of such profits to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners.[3]

Illustrations.

1. Land bought in the name of one partner, and paid for by the firm or out of the profits of the partnership business,[4] is *prima facie* partnership property.[5]

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[1] Altered from I. C. A. 253, sub-s. 1.

[2] Lindley, i. 643.

[3] See Illustration 6.

[4] *Nerot* v. *Burnand* (1827), 4 Russ. 247; 2 Bli. N. S. 215.

[5] *Wedderburn* v. *Wedderburn* (1856), 22 Beav. at p. 104; Lindley, i. 647.

Chap. VI. Art. 27.

2. One partner in a firm buys railway shares in his own name, and without the authority of the other partners, but with the money and on account of the firm. These shares are partnership property.[1]

3. The goodwill of the business carried on by a firm, so far as it has a saleable value, is partnership property.[2]

4. A. and B. take a lease of a colliery for the purpose of working it in partnership, and do so work it. The lease is partnership property.[2]

5. A. and B., being tenants in common of a colliery, begin to work it as partners. This does not make the colliery partnership property.[3]

6. If, in the case last stated, A. and B. purchase another colliery, and work it in partnership on the same terms as the first, the purchased colliery is not partnership property, but A. and B. are co-owners of it for the same shares and interests as they had in the old colliery.[4]

7. W., a nurseryman, devises the land on which his business is carried on and bequeaths the goodwill of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership. The land so devised to them is partnership property.[5]

8. A. is the owner of a cotton-mill. A., B. and C. enter into partnership as cotton-spinners, and it is agreed that the business shall be carried on at this mill. A valuation of the mill, fixed plant, and machinery is made, and the ascertained value is entered in the partnership books as A.'s capital, and he is credited with interest upon it as such in the accounts.

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[1] *Ex parte Hinds* (1863), 3 De G. & Sm. 603.

[2] Lindley, i. 653. See more as to goodwill in Chap. viii. below, Art. 57.

[3] Lindley, i. 651; *Crawshay* v. *Maule* (1818), 1 Swanst. 495, 518, 523. *A fortiori*, where the colliery belongs to A. alone before the partnership: *Burdon* v. *Barkus* (1862), 4 D. F. J. 42.

[4] Implied in *Steward* v. *Blakeway* (1869), 4 Ch. 603; though in that case it was treated as doubtful if there was a partnership at all.

[5] *Waterer* v. *Waterer* (1873), 15 Eq. 402.

During the partnership the mill is enlarged and improved, and other lands acquired and buildings erected for the same purposes, at the expense of the firm. The mill, plant, and machinery, as well as the lands afterwards purchased and the buildings thereon, are partnership property; and if, on a sale of the business, the purchase-money of the mill, plant, and machinery exceeds the value fixed at the commencement of the partnership, the excess is divisible as profits of the partnership business.[1]

Property bought with partnership money.

28. Unless a contrary intention appears by express agreement or by the nature of the transaction, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Illustrations.

1. L. and M. are partners. M., having contracted for the purchase of lands called the T. estate, asks L. to share in it, which he consents to do. The purchase-money and the amount of a subsisting mortgage debt on the land are paid out of the partnership funds, and the land is conveyed to L. and M. in undivided moieties. An account is opened in the books of the firm, called "the T. estate account," in which the estate is debited with all payments made by the firm on account thereof, and credited with the receipts. The partners build each a dwelling-house at his own expense on parts of the land, but no agreement for a partition is entered into. The whole of the estate is partnership property.[2]

2. Land is bought with partnership money on the account of one partner, and for his sole benefit, he becoming a debtor to the firm for the amount of the purchase-money. This land is not partnership property.[3]

3. [One of two partners expends partnership moneys in

[1] *Robinson* v. *Ashton* (1875), 20 Eq. 25.

[2] *Ex parte M'Kenna* (*Bank of England Case*) (1861), 3 D. F. J. 645.

[3] 3 D. F. J. 659 (1861); *Smith* v. *Smith* (1800), 5 Ves. 189.

Chap. VI. Art. 29.

buying a ship, which is registered in his name alone. The ship is not partnership property.[1]].

Description of interest of partners in partnership property.

It is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal.[2]

It will be observed that the acquisition of land for partnership purposes need not be an acquisition by purchase to make the land partnership property. Land coming to partners by descent or devise will equally be partnership property, if, in the language of James, L.J., it is "substantially involved in the business."[3]

Conversion into personal estate for some purposes of land held as partnership property.

29. Where land has become partnership property, it is treated as between the partners (including the representatives of a deceased partner), and also as between the real and personal representatives of a deceased partner, as personal and not real estate, unless a contrary intention appears either by express agreement or by the conduct of the partners.[4]

This is really involved in the foregoing article, but is of

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[1] *Walton* v. *Butler* (1861), 29 Beav. 428. This case as reported seems to go beyond the other authorities: but the facts are very briefly given, and there may have been circumstances which do not appear.

[2] Lindley, i. 660. It follows in theory that if one partner's interest is forfeited to the Crown, the whole property of the firm is forfeited: *Ib.* 661; Blackst. Comm. ii. 409.

[3] 15 Eq. 406; see Illustration 7 to Art. 27.

[4] Lindley, i. 667—670 (on the balance of authorities, which see there collected); Kindersley, V.-C., *Darby* v. *Darby* (1856), 3 Drew. 495, 506; and see 4 Ch. 609 (1869).

such importance as to call for a separate statement. The rule may now be taken as well settled, but has not been established without controversy. On this, however, it seems needless to dwell here. Ample materials for the critical and historical investigation of the subject will be found in Lord Justice Lindley's work by the reader who desires to pursue it further.

The application of this rule does not affect the character of any property for the purposes of the Mortmain Act of 9 Geo. 2.[1] But a deceased partner's share in land that has become partnership property is liable to probate duty, even if that partner's will purports to deal with it as realty.[2]

Conversion of joint into separate estate, or conversely, by agreement of partners.

30. Partners may at any time by agreement between themselves convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property.

Such conversion, if made in good faith, is effectual not only as between the partners, but as against the creditors of the firm and of the several partners.[3]

Exception.—If the firm or the partner whose separate estate is concerned becomes bankrupt or is insolvent after any such agreement and

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[1] *Ashworth* v. *Munn* (1878-80), 15 Ch. Div. 363.

[2] *Att.-Gen.* v. *Hubbuck* (1883-4), 10 Q. B. D. 488; 13 Q. B. Div. 275.

[3] Lindley, i. 654; *Campbell* v. *Mullett* (1818-9), 2 Swanst. at pp. 575, 584. As to what will or may amount to conversion, see the judgments in *Att.-Gen.* v. *Hubbuck*, *supra*, especially that of Bowen, L.J.

Chap. VI. Art. 31.

before it is completely executed, the property is not converted.[1]

Illustration.

A. and B. dissolve a partnership which has subsisted between them, and A. takes over the property and business of the late firm. A. afterwards becomes bankrupt. The property taken over by A. from the late partnership has become his separate estate, and the creditors of the firm cannot treat it as joint estate in the bankruptcy.[2]

What is a partner's share.

31. The share of a partner in the partnership property at any given time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged.[3]

Illustration.

F. and L. are partners and joint tenants of offices used by them for their business. F. dies, having made his will, containing the following bequest: "I bequeath all my share of the leasehold premises . . . . in which my business is carried on . . . . to my partner, L." Here, since the tenancy is joint at law, "my share" can mean only the interest in the property which F. had as a partner at the date of his death—namely, a right to a moiety, subject to the payment of the debts of the firm; and if the debts of the firm exceed the assets, L. takes nothing by the bequest.[4]

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[1] Lindley, i. 657; *Ex parte Kemptner* (1869), 8 Eq. 286.

[2] *Ex parte Ruffin* (1801), 6 Ves. 119; see also the Illustrations to Art. 76, below, where more complex cases are given. The question whether partnership property has been converted into separate property occurs in fact chiefly, if not exclusively, in the administration of insolvent partner's estates.

[3] Lindley, i. 661.

[4] *Farquhar* v. *Hadden* (1871), 7 Ch. 1.

Rules as to relations of partners in absence of special agreement.

Unless any different agreement appears, the interests of partners in the partnership property and their mutual rights and duties in relation to the partnership are determined by the rules stated in the following articles numbered thirty-two to thirty-nine inclusive.

Presumed equality of shares.

32. Subject to the right of each partner to be credited in account with the firm with the amount of capital actually brought in by him, and with the amount of any indemnity he may be entitled to under the next following article, the shares of all the partners are presumed to be equal; and all the partners are entitled to share equally in the profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the partnership.[1]

Illustration.

A. and B., solicitors, carrying on business separately, are jointly retained to defend certain actions. This they do, conducting different parts of the business. Unless any different agreement is proved, the profits of the whole business are equally divisible between A. and B.[2]

Form of the rule as to equality of partner's shares.

The form in which the rule is here expressed is determined by the usual mode of keeping partnership accounts, in which the firm is treated as a fictitious person distinct from its members, and the capital brought in by each member is a debt due to him from the firm. In a mercantile view the debts of the firm to individual partners for

[1] Lindley, i. 675, 801 *seq.*

[2] *Robinson* v. *Anderson* (1855), 7 D. M. G. 239.

Chap. VI. Art. 33.

capital and advances must be allowed for, as well as its debts to outside creditors, in order to ascertain the amount of its divisible property: and it is only to the available property of the firm as thus ascertained that the presumption of equal interest as between the partners applies. The Indian Contract Act (s. 253, sub-s. 1) gives the rule in a less artificial form:—

Otherwise expressed in Indian Act.

"The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss."

It then goes on (sub-s. 2) to lay down the rule as to sharing profit and loss to the same effect as here given. This last rule is independent of the shares of capital originally contributed by the partners; and it is founded on the consideration that it is impossible for the Court to set a proportionate value on the services of each partner where there is no express agreement, since the worth of a particular member to the firm may depend on many things besides the amount of capital brought in by him.[1]

Right of partner to indemnity and contribution.

33. Every partner is entitled to be indemnified in account with the firm for payments made and personal liabilities incurred by him—

a. In the ordinary and proper conduct of the business of the firm;[2]

b. In or about anything necessarily done for the preservation of the business or property of the firm.[3]

Actual payments and advances so made

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[1] Lindley, i. 676.

[2] Lindley, i. 759 *seq.*

[3] *Ex parte Chippendale* (*German Mining Company's Case*) (1853), 4 D. M. G. 19; *Burdon* v. *Barkus* (1862), 4 D. F. J. 42, 51.

carry interest at the rate of five per cent. per annum.[1]

This right is independent of agency.

Generally speaking, every partner is the agent of the firm for the conduct of its business (Articles 16—20, above), and as such is entitled to indemnity on the ordinary principles of the law of agency. But the rights of a partner to contribution go beyond this: he may charge the firm with moneys necessarily expended by him for the preservation or continuance of the partnership concern.[2] This right must be carefully distinguished from the power of borrowing money on the credit of the firm, of which it is altogether independent.[3] It arises only where a partner has incurred expense which under the circumstances, and having regard to the nature of the business, was absolutely necessary, and the firm has had the benefit of such expense; as where the advances are made to meet immediate debts of the firm (which is the most frequent case), or to pay the cost of operations without which the business cannot go on, such as sinking a new shaft when the original workings of a mine are exhausted.[4]

Limit of contribution may be fixed by agreement.

The total amount recoverable is not necessarily limited by the nominal capital of the partnership, for the expenditure on existing undertakings cannot be measured by the extent of the capital.[5] On the other hand, the limit of contribution may be fixed beforehand by express agreement among the members of a firm, and in that case no partner can call upon the others to exceed it, however great

[1] *Ex parte Chippendale* (1853), 4 D. M. G. 36, 43; *Sargood's claim* (1872), 15 Eq. 43.

[2] See note 3, last page.

[3] 4 D. M. G. 35, 40 (1853).

[4] *Burdon* v. *Barkus* (1862), 4 D. F. J. 42; *Ex parte Williamson* (1869), 5 Ch. 309, 313; and the other cases cited in Lindley, i. 766, *n.*

[5] *Ex parte Chippendale* (1853), 4 D. M. G. at p. 42.

Chap. VI. Art. 34.

may have been the amount of his own outlay on behalf of the firm.[1] This has nothing to do with the obligations of the partners to third persons, and accordingly does not affect the rule that "as to the rest of the world," unless the particular creditor has agreed to look only to some particular fund, "each partner is liable for the whole amount of the debts of the partnership."[2]

This duty imposed on the firm to indemnify any one of its members against extraordinary outlays for necessary purposes is one of a class of duties *quasi ex contractu* which are recognized by the law of England only very sparingly and under special circumstances. It is outside the rules of agency,[3] and has still less to do with trust; real analogies are to be found in salvage and average.

Right of partner to take part in business.

34. "Each partner has a right to take part in the management of the partnership business."[4]

Although it is the rule, in the absence of special agreement, that "one partner cannot exclude another from an equal management of the concern,"[5] yet it is "perfectly competent," and in practice very common, "for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others;"[6] and in that case the special agreement must be observed.

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[1] *Worcester Corn Exchange Company* (1853), 3 D. M. G. 180.

[2] Lindley, i. 376.

[3] The Lord Justice Turner, however, seems to assume an implied authority: 4 D. M. G. 40.

[4] I. C. A. 253, sub-s. 3.

[5] *Rowe* v. *Wood* (1822), 2 Jac. & W. at p. 558.

[6] Lindley, i. 541.

Duty of gratuitous diligence in partnership business.

35. "Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business."[1]

This rule, like the preceding, may be, and often is, departed from by express agreement. The second branch of it does not prevent a partner from recovering *compensation* for the extra trouble thrown upon him by a co-partner who has disregarded the first branch by wilful inattention to business.[2]

Power of majority to decide differences.

36. Where differences arise as to matters in the ordinary course of the partnership business, they are to be decided by a majority of the partners;[3] but the decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority, and every partner must have an opportunity of being heard in the matter.

This rule extends to powers conferred on a majority of the partners by express agreement.[4]

Change in nature of business requires consent of all.

37. No change can be made in the nature of the partnership business, or the place where

[1] I. C. A. 253, sub-s. 4; Lindley, i. 774.

[2] *Airey* v. *Borham* (1861), 29 Beav. 620.

[3] Verbally altered from I. C. A. 253, sub-s. 5.

[4] *Const* v. *Harris* (1824), Turn. & R. 496, 518, 525; *Blisset* v. *Daniel* (1853), 10 Ha. 493, 522, 527. See the section "Of the Powers of Majorities," Lindley, i. 598—609.

Chap. VI. Art. 38.

it is carried on, except with the consent of all the partners.[1]

This is one of the rules of partnership law which applies equally to companies; and in that application it is of great importance. "The governing body of a corporation that is in fact a trading partnership cannot in general use the funds of the community for any purpose other than those for which they were contributed."[2] But it would not be relevant here to pursue this subject farther.

New partner not admitted without consent of all.

38. "No person can be introduced as a partner without the consent of all those who for the time being are members of the firm."[3]

This is given by Lord Justice Lindley as "one of the fundamental principles of partnership law." The reason of it is that the contract of partnership is presumed to be founded on personal confidence between the partners, and therefore not to admit of its rights and duties being transferred as a matter of course to representatives or assignees.

Assignment of share of profits.

A partner can indeed assign or mortgage to a stranger his interest in the profits of the firm; and the assignee or mortgagee will thereby acquire "a right to payment of what, upon taking the accounts of the partnership, may be

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[1] *Natusch* v. *Irving*, Lindley, i. 601; *Const* v. *Harris* (1824), Turn & R. 517; I. C. A. 253, sub-s. 5. As to place, *Clements* v. *Norris* (1878), 8 Ch. Div. 129, which shows that one partner cannot without the consent of the others even renew an expired lease of premises where partnership works have already been carried on.

[2] Wickens, V.-C., in *Pickering* v. *Stephenson* (1872), 14 Eq. 322, 340.

[3] Lindley, i. 697; almost in the same words is I. C. A. 253, sub-s. 6.

due to the assignor or mortgagor."[1] It is at least doubtful whether he can call on the other partners to account with him, and his claim is subject to all their existing rights.[2]

"If the partnership is at will, the assignment dissolves it; and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution."[1]

An unauthorized attempt by one partner to admit a new member into the firm, otherwise than by assignment of his share, would have at most the effect of creating a *sub-partnership* between himself and the new person; that is, there would be as between themselves a partnership in his share of the profits of the original firm. But as against the original firm itself the new-comer would have no rights whatever.[3] "Qui admittitur socius ei tantum socius est, qui admisit; et recte, cum enim societas consensu contrahatur, socius mihi esse non potest, quem ego socium esse nolui. Quid ergo si socius meus eum admisit? ei soli socius est. Nam socii mei socius meus socius non est."[4]

Shares transferable by agreement.

On the other hand, the interest of all or any of the partners may be made assignable or transmissible by express agreement; and such agreement may be embodied once for all in the original constitution of the partnership.[5]

Custody and inspection of partnership books.

39. The partnership books must be kept at the place of business of the partnership (or the principal place if there is more than one), and every partner is entitled to have access to them,

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[1] Lindley, i. 698.
[2] *Kelly* v. *Hutton* (1868), 3 Ch. 703.
[3] Lindley, i. 54; *Brown* v. *De Tastet* (1821), Jac. 284.
[4] Ulpian, D. 12, 7, *pro socio*, 19, 20.
[5] Lindley, i. 699.

Chap. VI. Art. 40.

and to inspect and transcribe the same or any of them when he may think proper.[1]

It must be observed that this rule, like the foregoing ones from Art. 32 onwards, is subject to any special agreement that may be made between the partners.

Partner cannot be expelled unless under express power.

40. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Where such power is conferred, it must be exercised only in good faith with a view to the benefit of the firm,[2] and the partner whom it is sought to expel must have an opportunity of being heard.[3]

Effect of attempted irregular expulsion.

If it is attempted to expel a partner contrary to this rule—as, for instance, without hearing him—the attempted expulsion is merely void. The party does not cease to be a partner, and therefore sustains no loss in contemplation of law, and has no cause of action for damages;[4] his remedy is to claim reinstatement in his rights as a partner, which he can effectually do.[5]

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[1] *Greatrex* v. *Greatrex* (1847), 1 De G. & Sm. 692, see the terms of the order there: Lindley, i. 807. Where a firm has more than one place of business, it should always be expressly provided by the partnership articles which shall be considered the principal place of business and where the books are to be kept.

[2] Compare Art. 35, above; *Blisset* v. *Daniel* (1853), 10 Ha. 493.

[3] *Wood* v. *Woad* (1874), L. R. 9 Ex. 190; Lindley, ii. 844.

[4] *Wood* v. *Woad*, last note. In this case the association in question was not really a partnership, though spoken of as such: but for this purpose the principle is the same.

[5] *Blisset* v. *Daniel* (1853), 10 Ha. 493.

It is difficult to say how the Court would treat a clause expressly giving power to expel a partner not only without assigning specific reasons, but without hearing him. There can be little doubt that at one time it would have been held void. At the present day it seems more likely that effect would be given to it, if such appeared to be the real intention of the parties: but at any rate the clearest and most express words would be required to show such an intention.

In one recent case[1] an attempt was made, but without success, to extend this rule by analogy to the case of a clause in partnership articles expressly empowering one of the partners to determine the partnership by notice if he were dissatisfied with the conduct or results of the business. It was held that this was not analogous to an expulsion, and that, the partner in question being the sole judge of his own dissatisfaction, the power could be exercised at his absolute will and pleasure.

Retirement from partnership for a term only by consent.

41. Where a partnership has been entered into for a fixed term, no partner can retire from it during the term, except with the consent of all the partners, or in the exercise of an option previously conferred by express agreement.[2]

Retirement from partnership at will.

42. Where no fixed term has been agreed upon for the duration of the partnership, any partner may retire from it at any time upon giving express notice of his intention so to do to all the other partners.

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[1] *Russell* v. *Russell* (1880), 14 Ch. D. 471.

[2] I. C. A. 253, sub-s. 9 (slightly altered); Lindley, i. 735.

Chap. VI. Art. 43.

Where the partnership was originally constituted by deed, it is doubtful whether the notice must be under seal.[1]

Where partnership for term is continued over, continuance on old terms presumed.

43. Where a partnership entered into for a fixed term is continued after the term has expired, and without any new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as consistent with the right of any partner to determine the partnership at will.[2]

A continuance of the business by the acting partner or partners without any settlement or liquidation of the partnership affairs is presumed to be a continuance of the partnership.[3]

Illustrations.

1. A clause in partnership articles entered into between A. and B. for a fixed term provides that "in case either of the said partners shall depart this life during the said co-partnership term" the surviving partner shall purchase his share at a fixed value. A. and B. continue their business in partnership after the expiration of the term. This clause is still applicable on the death of either of them.[4]

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[1] Lindley, i. 221-2, who thinks it not necessary; *Crawshay* v. *Maule* (1818), 1 Swanst. at p. 508. See further as to notice of dissolution, Art. 47, below.

[2] I. C. A. 256 (slightly altered); Lindley, ii. 823.

[3] *Parsons* v. *Hayward* (1862), 4 D. F. J. 474.

[4] *Essex* v. *Essex* (1855), 20 Beav. 442; *Cox* v. *Willoughby* (1880), 13 Ch. D. 863. *Cookson* v. *Cookson* (1837), 8 Sim. 529, must be considered as not being law on this point. In *Yates* v. *Finn* (1880), 13 Ch. D. 839, it incidentally appears that Hall, V.-C., took a different view of some similar clause, but, the case being reported mainly for other points, the terms of the clause and the judge's reasons are not given.

2. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding.[1]

3. A. and B. are partners for seven years, A. taking no active part in the business. After the end of the seven years B. continues the business in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and A. is entitled to participate on the terms of the original agreement in the profits thus made by B.[2]

4. Partnership articles provide that a partner wishing to retire shall give notice of his intention a certain time beforehand. If the partnership is continued beyond the original term, this provision does not hold good, as not being consistent with a partnership at will.[3]

5. A. and B. enter into partnership for seven years, under articles which empower either partner, if the other neglects the business, to dissolve the partnership by notice, and purchase his share at a valuation. They continue in partnership after the seven years. This power of dissolution on special terms can no longer be exercised, as either party may now dissolve the partnership at will.[4]

Where business continued by surviving partners.

The same rule has been substantially acted upon in the case of a business being continued by the surviving partners after the death of a member of the original firm;[5] the Court inferred as a fact from their conduct that the business was continued on the old terms; but it is probably safe to assume that here also, if there were nothing more than a want of evidence to the contrary, a continuance on the old terms would be presumed.

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[1] *Gillett* v. *Thornton* (1875), 19 Eq. 599.

[2] *Parsons* v. *Hayward* (1862), 4 D. F. J. 474.

[3] *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. at p. 307.

[4] *Clark* v. *Leach* (1862), 32 Beav. 14; 1 D. J. S. 409; see the M. R.'s judgment, 32 Beav. 21.

[5] *King* v. *Chuck* (1853), 17 Beav. 325.

Chap. VI. Art. 44.

In the Scottish appeal of *Neilson* v. *Mossend Iron Co.*[1] the House of Lords held that a clause providing for the optional retirement of any partner on special terms "three months before the termination of this contract," was not applicable to the partnership as continued after the expiration of the original term. But this decision was on the construction of "a strangely and singularly worded article" (per Lord Selborne, at p. 304). Lord Watson affirmed the general rule that "when the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent, or, as it is termed in the law of Scotland, by 'tacit relocation.' The rule obtains in the case of many contracts besides that of partnership; and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewed contract." In this case, however, time was of the essence of the condition (pp. 308, 311).

Partners must act for common advantage.

44. "Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives."[2]

This is a fundamental rule for which it would be idle to cite specific authority.

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[1] 11 App. Ca. 298 (1886).

[2] I. C. A. 257.

Where written partnership articles are entered into, a clause to this effect is almost always inserted. There is no doubt, however, that the obligation of *uberrima fides* is incidental to the nature of the partnership contract, and the only object of expressing it on these occasions is to remind the partners of the duties imposed on them by the general law. The same remark applies to several other things which are usually expressed in such instruments. The practice is not altogether consistent with the general principles of conveyancing, but appears in this case to be reasonable and useful.

Partners must not make private gain by partnership transactions.

45. Every partner must account to the firm for any benefit derived by him from a transaction concerning the partnership.[1]

This rule applies to transactions undertaken after a partnership has been dissolved by the death of a partner, and before its affairs have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Illustrations.

1. A., B. and C. are partners in trade. C., without the knowledge of A. and B., obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. A. and B. may at their own option treat the renewed lease as partnership property.[2]

It would [probably] make no difference if C. had given notice to A. and B. that he intended to apply for a renewal of the lease for his own exclusive benefit.[3]

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[1] I. C. A. 258 (slightly altered).

[2] *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; I. C. A. 258, Illust. *a*.

[3] *Clegg* v. *Edmondson* (1857), 8 D. M. G. 787, 807.

Chap. VI. Art. 45.

2. A., B., C. and D. are partners in the business of sugar refiners. C. is the managing partner, and also does business separately, with the consent of the others, as a sugar-dealer. He buys sugar in his separate business, and sells it to the firm at a profit at the fair market price of the day, but without letting the other partners know that the sugar is his. The firm is entitled to the profit made on every such sale.[1]

3. A., B. and C. acquire the lease of certain works for the purposes of a business carried on by them in partnership, A. conducting the transaction with the former lessees on behalf of the firm. The former lessees, being anxious to find a responsible assignee and get the works off their hands, pay a premium to A. A. must account to his partners for the money thus received.[2]

4. One of two partners in a firm which held leaseholds for the purposes of the business dies. The lease expires before the affairs of the firm are completely wound up, and the surviving partner renews it. The renewed lease is partnership property.[3]

5. A member of a firm agrees to take a lease in his own name, but in fact for partnership purposes, and dies before the lease is executed. His representatives cannot deal with the lease without the consent of the surviving partners.[4]

Parallel rule in agency.

The general principle is one of those which the law of partnership takes from agency, considering each partner as agent for the firm; or it is perhaps better to say that it is established in both these branches of the law on similar grounds. The rule that an agent must not deal on his own account or make any undisclosed profit for himself in

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[1] *Bentley* v. *Craven* (1853), 18 Beav. 75.

[2] *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132.

[3] *Clements* v. *Hall* (1857), 2 De G. & J. 173, 186. The surviving partner is sometimes called a trustee or *quasi* trustee of the partnership property. But this use of the term is at least doubtful; see Lord Westbury's remarks in *Knox* v. *Gye* (1871-2), L. R. 5 H. L. 675.

[4] *Adler* v. *Fouracre* (1818), 3 Swanst. 489.

the business of his agency is a stringent and universal one.[1]

Partner must not compete with firm.

46. "If a partner, without the [knowledge and] consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby."[2]

This is an elementary rule analogous to the last. It follows that no partner can, without the consent of the rest, be a member of another firm carrying on the like business in the same field of competition; and if that consent is given, he is limited by its terms. And if special knowledge is acquired by him as a member of the one firm, he must not use it for the benefit of the other and to the prejudice of the first. And this equally holds if several members, or even all the members but one, are common to both firms.

If A., B., C. and D. are the proprietors of a morning newspaper, and A., B. and C. the proprietors of an evening newspaper for which the types and plant of the morning paper are used by agreement, D. may restrain A., B. and C. from first publishing in A., B. and C.'s evening paper intelligence obtained by the agency of the morning paper, and at the expense of the firm of A., B., C. and D.[3]

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[1] Story on Agency, §§ 210, 211; *Parker* v. *McKenna* (1874), 10 Ch. 96; *Hay's Case* (1875), *Ib.* 593; *Dunne* v. *English* (1874), 18 Eq. 524.

[2] I. C. A. 259 (the words in brackets seem superfluous, for there cannot be consent without knowledge); Lindley, i. 579.

[3] *Glassington* v. *Thwaites* (1822-3), 1 Sim. & St. 124.

Chap. VI. Art. 46.

An express covenant in partnership articles not to "engage in any trade or business except upon the account and for the benefit of the partnership," has been held to add nothing to the duty already imposed by law. It does not entitle the firm to an account of profits against a partner who has engaged in an independent trade not within the scope of the partnership business, and who derives no advantage in it from his position as a partner or by the use of any property of the firm.[1]

[1] *Dean* v. *MacDowell* (1877-8), 8 Ch. D. 345.

PART II.

The Dissolution of Partnerships.

CHAPTER VII.

Of Dissolution and its Consequences.

Chap. VII. Art. 47.

WHERE there is no agreement to the contrary between the partners, the dissolution of a partnership takes place in any of the events specified in the four following articles :—

Dissolution of partnership by retirement of partner.

47. If any partner gives notice to the other or others of his intention to dissolve the partnership, the partnership is dissolved as from the date of the notice.

"Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to this extent, that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs."[1]

The dissolution takes place as from the date of the notice, and without regard to the state of mind of the

[1] *Crawshay* v. *Maule* (1818), 1 Swanst. at p. 508.

Chap. VII. Art. 48.

partner to whom the notice is given. Insanity on his part does not make it less effectual.[1] Of insanity as a special ground of dissolution when the partnership is not at will we shall speak presently. A valid notice of dissolution once given cannot be withdrawn except by consent of all the partners.[2]

Where a partnership has been entered into for a fixed term, the partnership is at the end of that term dissolved "by effluxion of time" without any further act or notice, except in the cases mentioned in Art. 43, above.

By bankruptcy, &c. of partner.

48. The alienation of any partner's share by operation of law dissolves the partnership.

Illustration.

If a partner becomes bankrupt or is outlawed, or if his interest in partnership property is taken in execution and purchased by a stranger, the partnership is thereby dissolved.[3]

Execution for a partner's separate debt.

As to taking property of the firm in execution for a partner's separate debt, see Lindley,[4] and *Helmore* v. *Smith* (1).[5] Before the Judicature Acts it was an ex-

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[1] *Mellersh* v. *Keen* (1859), 27 Beav. 236; *Jones* v. *Lloyd* (1874), 18 Eq. 265.

[2] *Jones* v. *Lloyd* (1874), 18 Eq. at p. 271.

[3] Lindley, i. 220. Before January 1, 1883, if a female partner married without settling her share in the partnership to her separate use, the partnership was dissolved (but see Lindley, i. 85, and *Ashworth* v. *Outram*, 1877, 5 Ch. Div. 923). *Re Childs* (1874), 9 Ch. 508, shows that, for administrative purposes at least, a wife entitled for her separate use to a share of the profits of her husband's business may be considered as his partner. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, seems to make it clear that the marriage of a female partner would not now dissolve the partnership.

[4] Vol. i. 692.

[5] 35 Ch. Div. 436 (1887).

tremely clumsy process. The course provisionally suggested by Lord Justice Lindley corresponds, I believe, with the recent practice at Judges' Chambers,[1] but further amendment is wanted. The codifying Bill of 1882 proposed to deal with the matter by empowering the Court or a judge, on the application of any judgment creditor of a partner, to make a charging order on his share in the assets, to direct accounts and inquiries, and do whatever might have been done if the charge had been created by the partner himself, including a dissolution at need. I am permitted to state that this clause[2] had Lord Justice Lindley's approval.

The mode of its operation.

It is to be noted that the execution of a writ of *fi. fa.* against partnership property does not of itself dissolve the partnership; but dissolution is the inevitable consequence of an undivided interest in partnership property being acquired under such a writ by a stranger. Therefore there is not a dissolution by operation of law where a solvent partner buys the debtor's share, and pays for it out of assets of the firm; though it remains undecided what would be the effect of his buying it with his separate money.[3] "What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other method of proceeding. That does involve practically the dissolution of the whole concern. Now, what makes

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[1] See *Whetham* v. *Davey* (1885), 30 Ch. D. at p. 579.

[2] Clause 41; see the Bill reprinted in Appendix below.

[3] *Helmore* v. *Smith* (1887), 35 Ch. Div. 436.

Chap. VII. Art. 49.

this particular case easy is this: when the sheriff sold under the *fi. fa.* he sold to the continuing partner, the solvent partner, who did not pay the purchase-money to the sheriff out of his own money, but paid for what he purchased out of the assets of the partnership. In point of law, the necessary result of buying this share with the funds of the concern is that there was no dissolution at all."[1]

Where judgment has been given in an action in the Chancery Division for the dissolution of a partnership, and a receiver appointed, and afterwards a creditor recovers judgment against the firm in an action in the Queen's Bench Division, the judgment creditor can obtain, by applying in the Chancery action, a charge for the debt and costs on the partnership money in the hands of or coming to the receiver, undertaking to deal with the charge according to the order of the Court.[2]

By death of partner.

49. The death of any partner dissolves the partnership.[3]

Explanation.—In the absence of any previous agreement to the contrary, the partnership is dissolved, in any of the cases mentioned in the three foregoing articles, as between all the members of the firm, and not only as to that partner who retires, or who dies, or whose share becomes alienated.

By assignment of partner's share in partnership at will.

50. If any partner assigns or incumbers his interest in the property or profits of the firm,

[1] Lindley, L. J., 35 Ch. Div. at p. 447.
[2] *Kewney* v. *Attrill* (1886), 34 Ch. D. 345.
[3] Lindley, i. 231.

the partnership not being for a fixed term, the partnership is thereby dissolved.[1]

By business of partnership becoming unlawful.

51. A partnership is in every case dissolved by the happening of an event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.[2]

Illustrations.

1. A. and B. charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the time appointed for loading. The partnership between A. and B. is dissolved.[3]

2. A. is a partner with ten other persons in a certain business. An Act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. The partnership of which A. was a member is dissolved.

3. A., an Englishman, and domiciled in England, is a partner with B., a domiciled foreigner. War breaks out between England and the country of B.'s domicil. The partnership between A. and B. is dissolved.[4]

Causes for dissolution of partnership by the Court.

52. The Court,[5] or in the case of a partner becoming lunatic the Lord Chancellor,[6] may

[1] See on Art. 38, above.

[2] Lindley, i. 232; I. C. A. 255.

[3] See *Esposito* v. *Bowden* (1857), 7 E. & B. 763; 27 L. J. Q. B. 17.

[4] *Griswold* v. *Waddington* (1818) (Supreme Court, New York), 15 Johns. 57; 16 *ib.* 438.

[5] All causes and matters for the dissolution of partnerships or the taking of partnership accounts are assigned to the Chancery Division (subject to Rules of Court or orders of transfer) by s. 34 of the Judicature Act, 1873.

[6] Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70, s. 123.

Chap. VII. Art. 82.

dissolve the partnership at the suit of a partner in any of the following cases:—

1. When a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind.[1]
2. When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract.[2]
3. When a partner, other than the partner suing, becomes liable to a criminal prosecution.[3]
4. When a partner, other than the partner suing, so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.[4]
5. When a partner, other than the partner suing, the partnership being for a fixed term, assigns or incumbers his interest in the property or profits of the firm.[5]

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[1] Lindley, i. 224-7; *Jones* v. *Noy* (1833), 2 M. & K. 125; *Anon.* (1855-6), 2 K. & J. 441; *Leaf* v. *Coles* (1851), 1 D. M. G. 171. It is well settled that lunacy does not of itself work a dissolution.

[2] *Whitwell* v. *Arthur* (1865), 35 Beav. 140.

[3] *Essel* v. *Hayward* (1860), 30 Beav. 158.

[4] *Harrison* v. *Tennant* (1856), 21 Beav. 482.

[5] Art. 38, above.

6. When the business of the partnership can only be carried on at a loss.[1]

Dissolution at suit of partner of unsound mind.

It is to be observed that the right of having the partnership dissolved in the case of one partner becoming insane is not confined to his fellow-partners. A dissolution may be sought and obtained on behalf of the lunatic partner himself; and this may be done either by his committee in lunacy under the Lunacy Regulation Act, or, where he has not been found lunatic by inquisition, by an action brought in his name in the Chancery Division by another person as his next friend. In the latter case, the Court may, if it thinks fit, direct an application to be made in Lunacy before finally disposing of the cause.[2]

What conduct of a partner is ground for dissolution.

It is rather difficult to fix the point at which acts of a partner tending to shake the credit of the firm and the other partners' confidence in him become sufficient ground for demanding a dissolution. The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution where it cannot be imputed to that partner's own wilful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it.[3] On the other hand, conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which was calculated to destroy mutual con-

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[1] *Jennings* v. *Baddeley* (1856), 3 K. & J. 78: "if the purposes of the partnership cannot be carried into effect with any reasonable prospect of profit;" per Cotton, L.J., 13 Ch. Div. at p. 65.

[2] *Jones* v. *Lloyd* (1874), 18 Eq. 265.

[3] *Anon.* (1855-6), 2 K. & J. 441, 452.

Chap. VII. Art. 52.

fidence among the partners, has been held sufficient ground for a dissolution.[1]

Actual malversation of one partner in the partnership affairs, such as failing to account for sums received,[2] is ground for a dissolution; so is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another,[3] or one partner has habitually charged another,[4] with gross misconduct in the partnership affairs.

In *Atwood* v. *Maude*[5] Lord Cairns said:—

"It is evident . . . that in every partnership . . . such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either;" and he added that, when it is admitted that this state of feeling does in fact exist, it becomes immaterial by whom a judicial dissolution of the partnership is sought. If this dictum could be accepted to its full extent in the absence of positive authority, subsection 4 of the foregoing article might be put in a broader and simpler form to this effect:—

"When the relations between the partners or some of them have become such that in the judgment of the Court a continuance of mutual confidence is thereby rendered impossible."

Dissolution by order of the Court takes effect as from the date of the judgment, unless ordered on the ground of a specific breach of duty giving the other member or mem-

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[1] *Harrison* v. *Tennant* (1856), 21 Beav. 482.

[2] *Cheesman* v. *Price* (1865), 35 Beav. 142.

[3] *Baxter* v. *West* (1860), 1 Dr. & Sm. 173.

[4] *Watney* v. *Wells* (1861), 30 Beav. 56; *Leary* v. *Shout* (1864), 33 Beav. 582.

[5] 3 Ch. at p. 373 (1868).

bers a right to dissolve the partnership, in which case alone it may relate back to that event.[1]

Rights of creditors against apparent members of firm.

53. The rights of a creditor of a firm against its apparent members are not affected by any dissolution or change in the firm of which that creditor had not notice.[2]

An advertisement in the London Gazette is equivalent to notice as to creditors who were not in fact customers of the firm before the time of the dissolution or change.[3]

Exceptions.—The estate of a partner who dies,[4] or who becomes bankrupt,[5] or of a partner who, not having been known to the creditor to be a partner, retires from the firm,[6] is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Illustrations.

1. A. and B., partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from the 1st of January; but they do not discontinue the business of the firm or give notice of the dissolution. On the 1st of February A. indorses a bill in the partnership name to C., who is not aware of the dissolution. The firm is liable on the bill.[7]

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[1] *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.

[2] Lindley, i. 406; I. C. A. 264.

[3] *Ib.* 415, 416.

[4] *Ib.* 404.

[5] *Ib.* 405.

[6] *Ib.*

[7] *Ex parte Robinson* (1833), 3 D. & Ch. at p. 388, per Lord Brougham.

Chap. VII. Art. 54.

2. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorized agent. A. was formerly a partner in the firm, but not to the knowledge of B., the holder of the bill, and ceased to be so before the date of the bill. B. cannot sue A. upon the bill.[1]

3. A. is a partner with other persons in a bank. A. dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A.'s estate is liable to customers of the bank for the balances due to them at A.'s death, so far as they still remain due, and for other partnership liabilities incurred before A.'s death;[2] but not for any debts contracted or liabilities incurred by the firm towards customers after A.'s death.[3]

In the case of liabilities of the firm which have arisen after A.'s death, it makes no difference that at the time when the partnership liability arose the customer believed A. to be still living and a member of the firm.[4]

Right of partners to notify dissolution.

54. On the dissolution of a partnership, or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.[5]

In *Troughton* v. *Hunter*[5] it appeared to be the practice of the London Gazette Office not to insert a notice of dissolution unless signed by all the partners; and the defen-

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[1] *Carter* v. *Whalley* (1830), 1 B. & Ad. 11.

[2] *Devaynes* v. *Noble* (1816), 1 Mer. 529; *Sleech's Case* (1816), at p. 539; *Clayton's Case* (1816), at p. 572.

[3] *Brice's Case* (1816), *Ib.* 622.

[4] *Houlton's Case* (1816), *Ib.* 616. The judgment itself in this case is not reported; but it appears by the marginal note and the context that it followed *Brice's Case*.

[5] 18 Beav. 470 (1854).

dant, who had refused to sign a notice, was decreed to do all things necessary for procuring notice of the dissolution to be inserted in the Gazette. A retiring partner may be ordered to sign a notice of dissolution for insertion in the Gazette, even if no other specific relief is claimed.[1]

Continuing authority of partners for purposes of winding-up.

55. After the dissolution of a firm, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution,[2] but not otherwise.

Exception.—The firm is in no case bound by the acts of a bankrupt[3] partner, except as to any other partner who may be liable under Art. 13.[4]

Illustrations.

1. A. and B. are partners. A. becomes bankrupt. B. gives acceptances of the firm as a security for an existing partnership debt to C., who knows of A.'s bankruptcy. C. indorses the bills for value to D., who does not know of the bankruptcy. D. is entitled to rank as a creditor of the firm for the amount of the bills.[5]

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[1] *Hendry* v. *Turner* (1886), 32 Ch. D. 355.

[2] Lindley, i. 412, with slight verbal alteration: *Lyon* v. *Haynes* (1843), 5 M. & Gr. 504, 541.

[3] Bankruptcy relates back to the completion of the act of bankruptcy on which a receiving order is made: Bankruptcy Act, 1883, s. 43.

[4] Lindley, ii. 1134.

[5] *Ex parte Robinson* (1833), 3 Dea. & Ch. 376, and 1 Mont. & A. 18.

Chap. VII. Art. 55.

2. A. and B. are partners. A. becomes bankrupt. B. continues to carry on the trade of the firm, and pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against A.'s trustee in bankruptcy.[1]

3. A. and B. are partners in trade. A. becomes bankrupt. The solvent partner, B., but not other persons claiming through him by representation or assignment, may, notwithstanding the dissolution of the partnership wrought by A.'s bankruptcy, sell any of the partnership goods to pay the debts of the firm,[2] and the purchaser will be entitled to the entire property in such goods as against A.'s trustee in bankruptcy.[3]

4. A. and B., sharebrokers in partnership, buy certain railway shares. Before the shares are paid for they dissolve partnership. Either of them may pledge the shares to the bankers of the firm to raise the purchase-money, and may authorize the bankers to sell the shares to indemnify themselves.[4]

5. A. and B., having been partners in a business, dissolve partnership, and A. takes over the business and property of the firm. If A. gives negotiable instruments in the name of the old firm, then (subject to the rights of creditors of the firm stated in Art. 53) B. is not bound thereby,[5] unless he has specially authorized the continued use of the name for that purpose.[6]

6. Partnership articles provide that, before each division of profits, interest shall be credited to both partners on the amount of capital standing to the credit of their respective accounts. This alone does not authorize the allowance of interest, in the event of a dissolution, for the interval between

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[1] *Woodbridge* v. *Swann* (1833), 4 B. & Ad. 633.

[2] *Fraser* v. *Kershaw* (1856), 2 K. & J. 496. The authority to sell is "personal to him in his capacity as partner:" p. 501.

[3] *Fox* v. *Hanbury* (1776), Cowp. 445.

[4] *Butchart* v. *Dresser* (1853), 4 D. M. G. 542.

[5] *Heath* v. *Sanson* (1832), 4 B. & Ad. 172.

[6] *Smith* v. *Winter* (1838), 4 M. & W. 454.

the dissolution and the final settlement of the partnership accounts.[1]

7. A., B. and C. are partners. A. and B. commit acts of bankruptcy, and afterwards indorse in the name of the firm a bill belonging to the partnership. The indorsee acquires no property in the bill.[2]

8. A. and B. are partners. C. is a creditor of the firm; A., having committed an act of bankruptcy to the knowledge of C.,[3] pays C.'s debt. This is an unauthorized payment as against the firm, and if the firm afterwards becomes bankrupt, C. must repay the money to the trustee of the joint estate.[4]

9. A. and B. are partners. A. commits an act of bankruptcy, and afterwards accepts a bill in the name of the firm for his own private purposes, which comes into the hands of a holder in good faith and for value. B. is liable on the bill, as A. and B. were ostensibly partners with the assent of B. when the acceptance was given.[5]

10. [A. and B. being partners, draw a bill payable to the order of the firm. They dissolve partnership, and A. indorses the bill in the name of the firm, but for his own purposes and without B.'s knowledge, to C., who knows of the dissolution of the firm, but does not know that A.'s indorsement is not for a partnership purpose. B. is liable on the indorsement.[6]]

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[1] *Barfield* v. *Loughborough* (1872), 8 Ch. 1.

[2] *Thomason* v. *Frere* (1808), 10 East, 418.

[3] If C. had not notice of the act of bankruptcy, he would be protected by s. 49 (*a*) of the Bankruptcy Act, 1883.

[4] *Craven* v. *Edmondson* (1830), 6 Bing. 734.

[5] *Lacy* v. *Woolcott* (1823), 2 D. & R. 458.

[6] *Lewis* v. *Reilly* (1841), 1 Q. B. 349: "It is perhaps doing no violence to language to say that the partnership could not be dissolved as to this bill, so as to prevent it from being indorsed by either defendant in the name of the firm," Lord Denman, C.J., at p. 351. But it is difficult to admit the correctness of the decision: see Lindley, i. 409, 413. The earlier case of *Smith* v. *Winter* (1838), 4 M. & W. 454 (not cited in *Lewis* v. *Reilly*), assumes that authority in fact must be shown for such a use of the partnership name even for the purpose of liquidating the affairs of the firm.

Chap. VII. Art. 55.

11. [A., B. and C. are partners in a woollen mill. A. dies, and B. and C. continue the business. D., the owner of the mill, distrains for arrears of rent which were partly due in the lifetime of A. B. and C. agree with D. that he shall take the partnership fixtures and machinery in satisfaction of the rent, and re-let them to B. and C., the transaction being in fact a mortgage. This does not affect A.'s interest in the fixtures and goods comprised in the conveyance, and D. is not entitled to the entire property in them as against A.'s executors.[1]]

12. A. and B. are partners. A. files a liquidation petition, and a receiver of his property is appointed. B. is still entitled to get in the partnership assets, and to use for that purpose the name of the trustee in A.'s bankruptcy, on giving him an indemnity.[2]

On this subject the language of the Indian Contract Act (s. 263) is more general. It says:

"After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership."

And Lord Eldon spoke more than once of a partnership after dissolution as being in one sense not dissolved until the affairs of the firm are wound up.[3]

Lord Justice Lindley shows, however (i. 411—414), that a more guarded statement is at least desirable. He points out that the strongest case on the subject is (with the doubtful exception of *Lewis* v. *Reilly*, Illust. 10, above) *Butchart* v. *Dresser* (Illust. 4); and this decides at most "that in the event of a dissolution it is competent for one

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[1] *Buckley* v. *Barber* (1851), 6 Ex. 164; 20 L. J. Exch. 114. This decision is not consistent with the general current of authorities, and is probably wrong. It is expressly dissented from by Lord Justice Lindley (i. 666), who further states that it was disapproved in an unreported case by James, L.J.

[2] *Ex parte Owen* (1884), 13 Q. B. Div. 113.

[3] Swanst. 508 (1818), see on Art. 47, above; 2 Russ. 337, 342.

partner to dispose of the partnership assets for partnership purposes." Paulus incidentally mentions the rule as existing in some such limited form in the Roman law:—

"Si vivo Titio negotia eius administrare coepi, intermittere mortuo eo non debeo; nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est; *ut accidit, cum alter ex sociis mortuus est.*"[1]

[1] D. 3, 5, *de negot. gest.* 21, § 2.

CHAPTER VIII.

Rights of Partners after Dissolution.

Chap. VIII. Art. 56.

Rights of partners as to application of partnership property.

56. "Every partner has a right," as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, "to have the property of the partnership applied in payment of the debts and liabilities of the firm," and to have the surplus assets after such payment "applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm;"[1] and for that purpose any partner or his representatives may, upon the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.[2]

Illustrations.

1. One of the partners in a firm becomes bankrupt. All debts due from him to the firm must be satisfied out of his share of the partnership property before recourse is had to such share for payment of debts due either to any of the partners on his private account or to any other person.[3]

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[1] Lindley, i. 679, 680.

[2] Common practice; compare I. C. A. 265.

[3] *Croft* v. *Pike* (1733), 3 P. Wms. 180; and see Ch. xi. Art. 76-79, below.

2. A creditor of one partner in a firm on a separate account unconnected with the partnership takes his share in the partnership property in execution. He is entitled at most to the amount of that partner's interest after deducting everything then due from him to the other partners on the partnership account;[1] but in such deduction debts due to all or any of the other partners otherwise than on the partnership account are not to be included.[2]

3. A. and B. are partners, having equal shares in their business. A. dies, and B. continues to employ his share of the partnership capital in the business without authority, thereby becoming liable to A.'s estate for a moiety of the profits.[3] A.'s estate is entitled not only to a moiety of the partnership property, but to a lien upon the other moiety for the share of profits due to the estate.[4]

4. A. and B. are partners. The partnership is dissolved by agreement, and the agreement provides that B. shall take over the business and property of the firm and pay its debts. B. takes possession of the property and continues the business, but does not pay all the debts, and some time afterwards mortgages a policy of assurance, part of the assets of the late partnership, to C., who knows the facts above mentioned, and also knows that the policy mortgaged to him is part of the partnership assets. A. or his representatives may require any part of the partnership property remaining in the hands of B. to be applied in payment of the unpaid debts of the firm, but they have no such right as to the policy mortgaged to C. Here C. claims through B. not as partner, but as sole owner, and is not bound to see to the application of his money.[5]

Nature of the right as lien or quasi-lien.

The general rule has been thus stated: that "on the dissolution of the partnership all the property belonging

[1] *West* v. *Skip* (1749), 1 Ves. Sen. 239, 242; per Lord Mansfield, *Fox* v. *Hanbury* (1776), Cowp. at p. 449.

[2] *Skipp* v. *Harwood* (1747), 2 Swanst. 586; Lindley, i. 682.

[3] See Art. 61, below.

[4] *Stocken* v. *Dawson* (1845), 9 Beav. 239.

[5] *Re Langmead's Trusts* (1855), 20 Beav. 20; 7 D. M. G. 353.

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to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital."[1]

The right of each partner to control within certain limits the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained from time to time, its existence is assumed, but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as *equitable liens*, which have nothing to do with possession, and must therefore be carefully distinguished from the *possessory liens* which are familiar in several heads of the Common Law. The possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way.[2] Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.

Against whom available.

The lien, or quasi-lien,[3] as it is sometimes called, of each partner on the partnership property is available against the other partners, and against all persons claiming an interest in a partner's share as such. We have already seen that an assignee of a partner's share takes it subject to all claims of the other partners (Art. 38). But a purchaser or pledgee of partnership property from a partner, unless he has notice of an actual want of authority to dispose of it, is entitled to assume that his money will be

[1] *Darby* v. *Darby* (1856), 3 Drew. at p. 503.

[2] On the still unsettled question of an unpaid vendor's rights in this respect, see *Page* v. *Cowasjee Eduljee* (1866), L. R. 1 P. C. 145.

[3] 25 Beav. 286 (1858).

properly applied for partnership purposes, and may rely on the disposing partner's receipt as a complete discharge.[1] Likewise the individual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners;[2] for, as we have seen above (on Art. 11, p. 21), English law does not recognize the firm as having rights or liabilities distinct from those of the individual partners, and a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature. There seems to be nothing to alter this in the Rule of Court now in force as to judgments against partners in the name of the firm.[3] Creditors, on the other hand, have no specific rights against any property of the firm except such as they may acquire by actually taking it in execution.[4]

Applies only to partnership property at date of dissolution.

During a partnership the lien in question attaches to all partnership property for the time being. Upon a dissolution it extends only to the partnership property existing as such at the date of dissolution. Therefore, if one of two partners dies, and the executors of the deceased partner allow the survivor to continue the business of the firm, there will be no lien in their favour on property acquired by him in this course of business in addition to or in substitution for partnership property; and in the event of the surviving partner's bankruptcy, goods brought into the business by him will belong to his creditors in the new business, not to the creditors of the former partnership.[5]

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[1] *Langmead's Trusts*, see Illust. 4, above.

[2] Lindley, i. 541, 700.

[3] Rules of the Supreme Court, Order XLII. r. 10 (No. 588); Art. 68, below.

[4] *Stocken* v. *Dawson* (1845), 9 Beav. 239.

[5] *Payne* v. *Hornby* (1858), 25 Beav. 280, 286-7.

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It is probable, however, that a surviving partner who insisted on carrying on the business against the will of the deceased partner's representatives would be estopped from showing that property in his hands and employed in the business was not part of the actual partnership assets.[1]

Sale of goodwill on dissolution.

57. On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners.[2]

Rights and duties of vendor and purchaser of goodwill.

Explanation.—Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules in the absence of any special agreement excluding or varying their effect:—

a. The purchaser alone may represent himself as continuing or succeeding to the business of the vendor.[3]

b. The vendor may nevertheless carry on

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[1] This is given as the general rule in Dixon on Partnership, 493, and the rule in *Payne* v. *Hornby* as the exception; and a dictum of Lord Hardwicke's is there cited (*West* v. *Skip*, 1749, 1 Ves. Sen. at p. 244), that the lien extends to stock brought in after the determination of the partnership. But this dictum relies on an old case of *Bucknal* v. *Roiston* (1709), Pre. Ch. 285, which was a case not of partnership at all, but of a continuing pledge of stock in trade: from which the partner's lien is expressly distinguished in *Payne* v. *Hornby*.

[2] Lindley, ii. 860. In other words, the goodwill, and therefore also the firm-name, is part of the partnership assets: *Levy* v. *Walker* (1879), 10 Ch. Div. 436, 446.

[3] *Churton* v. *Douglas* (1859), Johns. 174.

a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business.[1]

c. The vendor may publicly advertise his business, and solicit the customers of the former firm.[2]

d. The sale [probably] carries the exclusive right to use the name of the former firm.[3] It is doubtful whether the purchaser may use it without qualification if it consists only of the name of the vendor or of any other person who by such use would be exposed to be sued as an apparent partner in the business.[4]

e. The foregoing rules apply to the sale by a retiring partner, or a surviving partner,

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[1] *Churton* v. *Douglas* (1859), Johns. 174.

[2] *Labouchere* v. *Dawson* (1872), 13 Eq. 322, laid down a contrary rule; but this, after being materially qualified in *Leggott* v. *Barrett* (1880), 15 Ch. Div. 306 (overruling *Ginesi* v. *Cooper & Co.*, 1880, 14 Ch. D. 596), was disapproved by a majority of the C. A. in *Pearson* v. *Pearson* (1884), 27 Ch. Div. 145; and Stirling, J., in *Vernon* v. *Hallam* (1886), 34 Ch. D. 748, treated *Labouchere* v. *Dawson* as overruled. See also *Walker* v. *Mottram* (1881), 19 Ch. Div. 355. A partner who has been expelled under a provision in the articles is not restrained from carrying on the same business on his own account, or soliciting customers of the old firm: *Dawson* v. *Beeson* (1882), 22 Ch. Div. 504.

[3] *Levy* v. *Walker* (1879), 10 Ch. Div. 436.

[4] *Churton* v. *Douglas* (1859), Johns. at p. 190. But the tendency of what was said in *Levy* v. *Walker* is decidedly towards leaving it for the vendor in such a case to protect himself against this inconvenience by special conditions.

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or the representatives of a deceased partner to continuing or incoming partners, or to any other purchaser of the business of the firm, of his or their share or interest in the goodwill of the business carried on by the firm.[1]

Illustrations.

1. A., B. and C. have carried on business in partnership under the firm of A. and Co. A. retires from the firm on the terms of the other partners purchasing from him his interest in the business and goodwill, and D. is taken in as a new partner. B., C. and D. continue the business under the firm of "B., C. and D., late A. and Co." A. may set up a similar business of his own next door to them, but not under the firm of A. and Co.[2]

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the Court, and a sale of the partnership assets, including the goodwill, is directed. The goodwill must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account;[3] for "no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a Court could prevent their so engaging."[4]

Nature and incidents of "goodwill."

The term *goodwill* is a commercial rather than a legal one, nor is its use confined to the affairs of partnership firms. It is well understood in business, but not easy to

[1] The rules are in fact established mainly by decisions on partnership cases.

[2] *Churton* v. *Douglas* (1859), Johns. 174.

[3] *Hall* v. *Barrows* (1863), 4 D. J. S. at p. 159.

[4] Lord Eldon's decree in *Cook* v. *Collingridge* (1825), given in 27 Beav. 456, 459. The declarations and directions there inserted contain an exposition of the nature and legal incidents of goodwill to which there is still little to add in substance.

define. It has been described as "the benefit arising from connexion and reputation,"[1] "the probability of the old customers going to the new firm" which has acquired the business.[2] That which the purchaser of a goodwill actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name (perhaps with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out"), and to represent himself to former customers as the successor to that business. Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the same line of business;[3] he may publish to the world, by advertisements or otherwise, the fact that he carries on such business; and it seems to be now settled, though for some years it was held otherwise, that he may even specially solicit the customers of the old firm to transfer their custom to him.[4] But he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the *same* business. "You are not to say, I am the owner of that which I have sold."[5] Probably the purchasers of the business might successfully object even to his carrying on a competing business in his own name alone, if that name had been used as the name of the late firm and had become

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[1] Lindley, ii. 859.

[2] Lord Romilly, M.R., *Labouchere* v. *Dawson* (1872), 13 Eq. at p. 324; and see *Llewellyn* v. *Rutherford* (1875), L. R. 10 C. P. 456; *Wedderburn* v. *Wedderburn* (1855-6), 22 Beav. at p. 104.

[3] *Churton* v. *Douglas* (1859), Johns. 174.

[4] *Pearson* v. *Pearson*, 27 Ch. Div. 145; *Vernon* v. *Hallam*, 34 Ch. D. 748; see p. 105 above.

[5] *Churton* v. *Douglas* (1859), Johns. at p. 193.

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part of its goodwill.[1] These rights of vendors and purchasers of goodwill clearly belong to the province of law, and are capable of legal definition: I have accordingly tried to state them distinctly in the explanation annexed to the last article, but for the reasons already indicated I have not sought to define the term *goodwill* itself.

Goodwill does not "survive."

It was formerly supposed that on the death of a partner in a firm the goodwill *survived*—that is, that the surviving partners were entitled to the whole benefit of it without any express agreement to that effect. But it is now perfectly settled that this is not so.[2]

It seems that in the business of solicitors goodwill in the ordinary sense does not exist.[3] The same reasons might apply to any other business depending on personal and confidential relations, and wholly or mainly independent of local connexion.

Right of partners to restrain use of partnership name.

58. After a dissolution each of the partners in the dissolved firm or his representatives may [probably], in the absence of any agreement to the contrary, restrain any other partner or his representatives from carrying on the same business under the partnership name until the affairs of the firm have been wound up and the partnership property disposed of.[4]

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[1] *Churton* v. *Douglas* (1859), Johns. at pp. 197, 198. As to the right to the exclusive use of a trade name, see Art. 11, above.

[2] The notion of the goodwill surviving is expressly contradicted, for instance, in *Smith* v. *Everett* (1859), 27 Beav. 446.

[3] See *Austen* v. *Boys* (1858), 2 De G. & J. 626, 635; *Arundell* v. *Bell* (C. A. 1883), 31 W. R. 477.

[4] Lindley, ii. 862.

This is maintained by Lord Justice Lindley, notwithstanding a certain amount of apparent authority to the contrary,[1] as a necessary consequence of the principle stated in the last article. If any partner who may require it has a right to have the goodwill sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the goodwill of all saleable value. There is express authority to show that while a liquidation of partnership affairs is pending one partner must not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the saleable value of the partnership property until the sale.[2] This question does not in any case affect the independent right of a late partner who is living and not bankrupt to restrain the successor to the business from continuing the use of his name therein so as to expose him to the risk of being sued as an apparent partner.[3]

After the affairs of a dissolved firm are wound up every partner is free to use the firm-name in the absence of agreement to the contrary.[4]

59. Where one partner has paid a premium to another on entering into a partnership for a

Apportionment of premium in

[1] *Banks* v. *Gibson* (1865), 34 Beav. 566, looks at first sight like a direct authority *contra*. But there it appears that the assets of the firm had been divided by agreement between the late partners and the affairs of the firm wound up before the suit was brought. The goodwill, in fact, had ceased to exist, the partners having practically waived the right of having its value realized. Thus the decision is not inconsistent with Lord Justice Lindley's reasoning or with the proposition given in the text.

[2] *Turner* v. *Major* (1862), 3 Giff. 442.

[3] *Scott* v. *Rowland* (1872), 20 W. R. 508; see, however, note 4, p. 105, above.

[4] Per James, L.J., *Levy* v. *Walker*, 10 Ch. Div. 445 (1879).

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certain cases where partnership prematurely dissolved.

fixed term, and the partnership is dissolved before the expiration of such term otherwise than by the death of a partner,[1] there, subject to any special agreement between the partners, the Court may order the premium or a proportionate part thereof to be repaid.

In fixing the proportion of the premium to be returned, the Court has regard to the conduct of the partners, the terms of the partnership contract, and the length of time during which the partnership has continued.

Illustrations.

1. A. and B. enter into a partnership for five years, on the terms of A. paying a premium of £1,050 to B., £500 immediately, and the rest by instalments. In the second year of the partnership term, and before the whole of the premium has been paid, A. is adjudicated a bankrupt on the petition of B. B. is not entitled to any further payments on account of the premium, the partnership having been determined by his own act, and he may retain only so much of the part already paid to him as the Court thinks just.[2]

2. A. and B. enter into a partnership for a term of years, A. paying a premium to B. Long before the expiration of the term B. becomes bankrupt.

It has been held that B.'s estate is entitled to the whole premium, because A. bought the right of becoming his partner subject to the chance of the partnership being prematurely determined by ordinary contingencies, such as death or bankruptcy;[3]

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[1] See Lindley, i. 73; *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78.

[2] *Hamil* v. *Stokes* (1817), 4 Pri. 161, and better in Dan. 20.

[3] *Akhurst* v. *Jackson* (1818), 1 Swanst. 85. No stress is laid on the fact that at the commencement of the partnership A. knew that B. was in embarrassed circumstances, which is the only point on

And also that B.'s estate must return or give credit for a proportionate part of the premium, as the bankruptcy which determined the partnership was B.'s own act.[1]

3. A. and B. enter into partnership for fourteen years, B. paying a premium to A. In the course of the same year differences arise, there is a quarrel in which, in the opinion of the Court, A. and B. are both to blame, A. excludes B. from the business and premises of the partnership, and B. sues A. for a dissolution of partnership and return of the premium. A. is entitled to retain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon.[2]

4. A. and B. are partners for a term of fourteen years, B. having paid a premium of £600 to A. At the end of seven years of the term B. gives notice of dissolution to A., under a power contained in the partnership articles, on the ground of A.'s neglect of the business; and B. claims to have the premium apportioned on the principle of the last illustration. B. is not entitled to the return of half the premium, but only to such allowance as the Court thinks proper on a general estimate of the case.[3]

5. A. and B. enter into partnership for fourteen years, A. paying a premium calculated on two years' purchase of the net profits of the business. The partnership is dissolved within two years in consequence of mutual disagreements. No part of the premium is re-payable.[4]

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which the case can be distinguished from *Freeland* v. *Stansfeld;* see *Atwood* v. *Maude* (1868), 3 Ch. at p. 372.

[1] *Freeland* v. *Stansfeld* (1852-4), 2 Sm. & G. 479.

[2] *Bury* v. *Allen* (1844-5), 1 Coll. 589; the proportion to be returned or allowed for was calculated on the same principle in *Astle* v. *Wright* (1856), 23 Beav. 77; *Pease* v. *Hewitt* (1862), 31 Beav. 22; *Wilson* v. *Johnstone* (1873), 16 Eq. 606.

[3] *Bullock* v. *Crockett* (1862), 3 Giff. 507. There not quite seven years of the term had in fact elapsed, but the Court allowed only £100 to the partner who had paid £600 premium. The same rule of unlimited discretion as to the amount to be returned was acted upon in *Freeland* v. *Stansfeld*, supra.

[4] *Airey* v. *Borham* (1861), 29 Beav. 620.

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6. A. takes B. into partnership for seven years, knowing him to be inexperienced in the business, and requires him on that account to pay a premium. After two years A. calls on B. to dissolve the partnership on the ground of B.'s incompetence, and B. sues A. for a dissolution and the return of an apportioned part of the premium. B. is entitled to the return of such a part of the premium as bears the same proportion to the whole sum which the unexpired period of the term of seven years bears to the whole term.[1]

7. A. and B. enter into partnership for fourteen years, A. paying a premium. In the fourth year disputes arise, and a dissolution of the partnership by consent is gazetted. No agreement is made at the time of dissolution for the return of any part of the premium. A. cannot afterwards claim to have any part of it returned.[2]

Discrepancy of authorities: rule proposed in *Wilson* v. *Johnstone*.

It will be seen from the illustrations that no definite rule can be given which will reconcile the existing authorities. In *Wilson* v. *Johnstone*,[3] Wickens, V.-C., gave his opinion as to what the rule ought to be on principle. He considered it applicable only to a "premature dissolution by the Court as distinguished from premature dissolution by contract" (this is hardly consistent with the practice as shown in the reported cases, for in several of them the partners were agreed that there must be a dissolution, and the return or apportionment of the premium was the only matter in dispute): but in the event of a dissolution by the Court the partner who had paid the premium was entitled, he thought, as of right to the return of a part of it proportionate to the time by which the intended term had been shortened, the premium being treated "as if it were an aggregate of yearly payments made in advance" (here the weight of authority is decidedly in favour of this mode of calculation);

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[1] *Atwood* v. *Maude* (1868), 3 Ch. 369.
[2] *Lee* v. *Page* (1861), 30 L. J. Ch. 857.
[3] 16 Eq. 606 (1873).

unless, indeed, the dissolution were caused by his own gross misconduct (being something more than simple breach of duty) in the affairs of the partnership, or he had otherwise shown an intention to repudiate the partnership contract altogether.[1]

Rule as given in *Atwood* v. *Maude*.

On the other hand, if we might take the rule simply from the judgment in *Atwood* v. *Maude*,[2] still the latest case on the subject in a Court of Appeal, the latter part of it might stand thus:—

"The Court will order the repayment of the premium, or such proportionate part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued;

unless the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium;

or unless the partnership has been dissolved by an agreement in which no provision has been made for a return of any part of the premium.

In the absence of special reasons to the contrary, the proportionate part to be returned is a sum bearing the same proportion to the whole premium as the unexpired part of the partnership term originally contracted for bears to the whole term."

One cannot help regretting that in deciding *Atwood* v. *Maude*[2] the Court did not take occasion to overrule expressly some of the former cases. It is now understood, however, that the terms of dissolution are a matter of judicial discretion for the judge who hears the cause, and that his

[1] In *Bluck* v. *Capstick* (1879), 12 Ch. D. 863, where the premium payable by the partner in fault was still unpaid, payment of it was ordered.

[2] 3 Ch. 369 (1868).

Chap. VIII. Art. 61.

decision will not be interfered with by the Court of Appeal except for strong reasons.[1]

This kind of relief must be sought at the same time with the dissolution of partnership itself. After decree, such an application is admissible only on special grounds.[2]

Rights of defrauded partner where partnership dissolved for fraud.

60. Where a partnership contract is rescinded on account of the fraud of one party to it, the partner defrauded is entitled to a lien on the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of an interest in the partnership property, and is also entitled to stand in the place of the creditors of the firm for any payments made by him in respect of partnership liabilities.[3]

Right of outgoing partner in certain cases to share profits after dissolution.

61. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partner or partners carry on the business of the firm with his capital or assets, without any final settlement of accounts as between the firm and the outgoing partner or his estate, there, in the absence of any special agreement to the contrary, the outgoing partner or his estate is entitled, at the option of such partner or his representatives, to such share of the profits made since the dissolution as the Court may

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[1] *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.
[2] *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170.
[3] *Mycock* v. *Beatson* (1879), 13 Ch. D. 384.

find to be attributable to the use of his capital or assets, or to the amount of such capital or assets with interest thereon at 5 per cent.[1]

Explanation.—How far the profits made since the dissolution are attributable to the outgoing partners' capital is a question to be determined with regard to the nature of the business, the amount of capital from time to time employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally.[2] There is no fixed rule that the profits are divisible in the same manner as if the partnership had not ceased.[3]

Illustrations.

1. A., B. and C. are partners in a manufacture of machinery. A. is entitled to three-eighths of the partnership property and profits. A. becomes bankrupt, and B. and C. continue the business without paying out A.'s share of the partnership assets or settling accounts with his estate. A.'s estate is entitled to three-eighths of the profits made in the business from the date of his bankruptcy until the final liquidation of the partnership affairs.[4]

2. A. and B. are partners. The partnership is dissolved by consent, and it is agreed that the assets and business of

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[1] Lindley, ii. 976, 983. Per Lord Cairns, *Vyse* v. *Foster* (1874), L. R. 7 H. L. at p. 329; *Yates* v. *Finn* (1880), 13 Ch. D. 839.

[2] Turner, L. J., in *Simpson* v. *Chapman* (1853), 4 D. M. G. at pp. 171, 172, following and approving Wigram, V.-C.'s, exposition in *Willett* v. *Blanford* (1841), 1 Ha. 253, 266, 272.

[3] *Brown* v. *De Tastet* (1821), Jac. at p. 296. Indeed, the presumption appears to be in favour of apportioning profits to capital without regard to the proportions in which they were divisible during the partnership. *Yates* v. *Finn* (1880), 13 Ch. D. at p. 843.

[4] *Crawshay* v. *Collins* (1826), 2 Russ. 325, 342—345, 347.

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the firm shall be sold by auction. A. nevertheless continues to carry on the business on the partnership premises, and with the partnership property and capital, and upon his own account. He must account to B. for the profits thus made.[1]

3. A. and B. trade in partnership as merchants. A. dies, and B. continues the business with A.'s capital. B. must account to A.'s estate for the profits made since A.'s death, but the Court will make in B.'s favour such allowance as it thinks just for his skill and trouble in managing the business.[2]

4. A., B. and C. are merchants trading in partnership under articles which provide that upon the death of any partner the goodwill of the business shall belong exclusively to the survivors. A. dies, and B. and C. pay or account for interest to his legatees, upon the estimated value of his share at the time of his death, but do not pay out the capital amount thereof. The firm afterwards make large profits, but the nature of the business and the circumstances at the time of A.'s death were such that at that time any attempt to realise the assets of the firm or the amount of A.'s share would have been highly imprudent, and would have endangered the solvency of the firm, so that A.'s share in the partnership assets if then ascertained by a forced winding-up would have been of no value whatever. Under these circumstances the profits made in the business after A.'s death are chiefly attributable, not to A.'s share of capital, but to the goodwill and reputation of the business and the skill of the surviving partners, and A.'s legatees have no claim to participate in such profits to any greater extent than the amounts already paid or accounted for to them in respect of interest on the estimated value of A.'s share.[3]

5. The facts are as in the last illustration, except that the articles do not provide that the goodwill shall belong to surviving partners. The deceased partner's estate is entitled to share in the profits made since his death and attributable to goodwill in a proportion corresponding to his interest in

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[1] *Turner* v. *Major* (1862), 3 Giff. 442.

[2] *Brown* v. *De Tastet* (1821), Jac. 284, 299; cp. *Yates* v. *Finn* (1880), 13 Ch. D. 839.

[3] *Wedderburn* v. *Wedderburn* (1855-6), 22 Beav. 84, 123, 124.

the value of the goodwill itself as a partnership asset. The evidence of experts in the particular business will be admitted, if necessary, to ascertain how much of the profits was attributable to goodwill.[1]

6. A. and B. are partners, sharing profits equally, in a business in which A. finds the capital and B. the skill. B. dies before there has been time for his skill in the business to create a goodwill of appreciable value for the firm. A. continues the business of the firm with the assistance of other skilled persons. B.'s estate is [probably] not entitled to any share of the profits made after B.'s death.

7. The other facts being as in the last illustration, B. dies after his skill in the business has created a connexion and goodwill for the firm. B.'s estate is [probably] entitled to a share of the profits made after B.'s death.[2]

Exercise of option to purchase outgoing partner's share.

62. Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the said option does not in all material respects comply with the terms thereof, he is liable to account for subsequent profits under the last preceding article.[3]

Illustrations.

1. A., B. and C. are partners under articles which provide that, on the death of A., B. and C. or the survivor of them

[1] See 22 Beav. at pp. 104, 112, 122 (1855-6).

[2] These last two cases are given by Wigram, V.-C., in his judgment in *Willett* v. *Blanford* (1841), 1 Ha. at p. 271.

[3] *Vyse* v. *Foster* (1874), L. R. 7 H. L. at p. 329.

Chap. VIII. Art. 62.

may continue the business in partnership with A.'s representatives or nominees, taking at the same time an increased share in the profits; and that, in that case, B. and C. or the survivor of them shall enter into new articles of partnership, pay out in a specified manner the value of the part of A.'s interest taken over, and give certain security to A.'s representatives. B. dies, then A. dies. C. carries on the business without pursuing the provisions of the articles as to entering into new articles, or paying out the value of the part of A.'s interest which he is entitled to acquire, or giving security. C. must account to A.'s estate for subsequent profits.[1]

2. A., B. and C. are partners under articles which provide that in case of the death of any partner the value of his share shall be ascertained as therein provided, with an allowance in lieu of profits at the rate of 5 per cent. per annum upon his share of the capital, and that the moneys found to be due to his executors shall be taken in full for the purchase of his share, and shall be paid out in a certain manner by instalments extending over two years. A. dies. B. and C. ascertain the amount of his share, and pay interest thereon to his representatives, but, acting in good faith for the benefit of the persons interested, they do not pay out the capital within the two years. This delay in making the complete payment out is not a material non-compliance with the terms of the option of purchase, and B. and C. cannot be called upon to account to A.'s estate for profits subsequent to A.'s death.[2]

Claims against surviving or continuing partners as executors or trustees.

The reader who is already acquainted with the cases now cited by way of illustration will perceive that several of them have deen designedly simplified in statement. It often happens that a partner in a firm disposing of his interest in it by will, and not desiring the affairs of the firm to be exposed to the interference of strangers, makes his fellow-partners or some of them his executors or trustees, or includes one or more of them among the persons

[1] *Willett* v. *Blanford* (1841), 1 Ha. 253, 264.
[2] *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318.

appointed to those offices. If, having done this, he dies while the partnership is subsisting, there may arise at the same time, and either wholly or in part in the same persons, two kinds of duty in respect of the testator's interest which are in many ways alike in their nature and incidents, but must be nevertheless kept distinct. There is the duty of the surviving partners *as partners* towards the deceased partner's estate; and of this we have just spoken. There is also the duty of the same persons, or some of them, *as executors or trustees* towards the persons beneficially interested in that estate; and this is determined by principles which are really independent of the law of partnership.

These distinguished by further illustrations.

The nature of these complications and the distinctions to be observed may be exhibited by some further illustrations.

3. A. and B. are partners. A. dies, having appointed B. his sole executor, and B. carries on the trade with A.'s capital. Here B. is answerable to A.'s estate *as partner*, and A.'s executor, if he were a person other than B. himself, would be the proper person to enforce that liability. B. is also answerable *as executor* to the persons beneficially interested in A.'s estate for the improper employment of his testator's assets.

4. A., a trader, appoints B. his executor and dies. B. enters into partnership with C. and D. in the same trade, and employs the testator's assets in the partnership business. B. gives an indemnity to C. and D. against the claim of A.'s residuary legatees. Here C. and D. are jointly liable with B. to A.'s residuary legatees, not as partners, but as having knowingly made themselves parties to the breach of trust committed by B.[1]

5. A. being in partnership with B. and C. appoints B. his executor and dies. B. and C. continue to employ A.'s capital in the business. B. is liable *as executor* to account for the

[1] *Flockton* v. *Bunning* (1868), 8 Ch. 323, *n.*

Chap. VIII. Art. 62.

profits received by himself from the use of A.'s capital, but not for the whole profits received therefrom by the firm.[1]

6. A. and B. are partners in trade. A. dies, having appointed C. and D. his executors, and authorized them to continue his capital in the trade for a limited time. On the expiration of that time C. and D. do not withdraw their testator's capital, but leave it as a loan to the firm, B. and E., the then members of the firm, knowing the limit of the authority given by A.'s will, and knowing the fund to belong to A.'s estate. B. and E. are not liable to render to the persons interested under A.'s will an account of profits since the time when A.'s capital ought to have been finally withdrawn, inasmuch as C. and D. themselves are liable to A.'s legatees only to make good the amount of the capital with interest.[2]

7. If the other facts are as in the last illustration, but B., one of A.'s executors, is himself a member of the firm, C. and D., the other executors, are still not accountable for any share of profits.[3] B. cannot be charged as executor with a greater share of profits in respect of his testator's capital than he has actually received,[4] and it is doubtful whether he can be charged with profits at all.[3]

8. A., B. and C. are partners in a bank which is carried on upon the known private credit of the partners, and with little or no capital. A. dies, having appointed C. and D. his executors. At the time of A.'s death his debt to the bank on his private account exceeds his share in the assets. B. and C. take D. into partnership, and continue the business without paying out A.'s share. C. and D. are not accountable as executors for any share of the profits since A.'s death, as A. really left no capital in the business to which such profits could be attributed, and D. entered the partnership and shared the profits not as executor, but on his own private

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[1] Per Lord Cairns, L. R. 7 H. L. 334 (1874).

[2] *Stroud* v. *Gwyer* (1860), 28 Beav. 130.

[3] *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318; see per Lord Selborne, at p. 346.

[4] *Jones* v. *Foxall* (1852), 15 Beav. 388; per James, L. J., *Vyse* v. *Foster* (1872), 8 Ch. at pp. 333, 334.

account. In like manner B., C. and D. are [probably] not accountable to A.'s estate as partners.[1]

Claims must be distinct and against proper parties in proper capacity;

In these "mixed and difficult" cases, as Lord Justice Lindley calls them,[2] it is important for persons seeking to assert their right to an account of profits to make up their minds distinctly in what capacity and on the score of what duty they will charge the surviving partners or any of them. If they proceed against executors as such for what is really a partnership liability, if any, and without bringing all the members of the firm before the Court, failure will be the inevitable result.[3] In a single case where one surviving partner out of several was held solely liable for the profits made by the employment of a deceased partner's capital by the firm, there was in fact only a *sub-partnership* between this survivor and the deceased: and it was therefore held that the other members of the principal firm were under no duty to the estate of one who was not *their* partner at all, and were not necessary or proper parties to be sued.[4]

and must be for profits alone, or for interest alone.

Again, the right, where it exists, is an alternative right to interest on the capital improperly retained in the business or to an account of the profits made by its use; and one or other of these alternatives must be distinctly chosen. A double claim for both profits and interest is of course inadmissible, and it has been laid down that a mixed claim is equally so. "If relief can be obtained on the footing of an account of profits, it must be an account of profits and

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[1] *Simpson* v. *Chapman* (1853), 4 D. M. G. 154.

[2] ii. 978.

[3] See *Simpson* v. *Chapman* (1853), 4 D. M. G. 154; *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318; *Travis* v. *Milne* (1851), 9 Ha. at p. 149.

Brown v. *De Tastet* (1821), Jac. 284; see Art. 38, above.

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nothing else;" a claim for profits as to part of the time over which the dealing extends, and interest as to other part, or for profits against some or one of the surviving partners, and interest against others, cannot be allowed.[1]

Account of profits after dissolution useless in practice.

It is a question, however, whether success in asserting claims of this kind is not in practice little more profitable than failure; for an account of profits after dissolution has seldom or never been known to produce any real benefit to the parties who obtained it.[2]

What interest given.

Where interest is given, it is generally simple interest at 5 per cent. It does not appear that a partner as such is ever charged with compound interest in these cases. A trustee-partner may in his quality of trustee be charged with compound interest at 5 per cent., if the retention of the fund in the hands of the firm, even as a loan, was a distinct and specific breach of trust.[3]

Surviving partner not a trustee.

A surviving partner is sometimes said to be a trustee for the deceased partner's representatives in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the Statute of Limitation, which runs from the deceased partner's death. The receipt of a particular debt due to the firm after six years have elapsed from that date does not revive the right to demand a general account.[4]

Statute of Limitation.

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[1] Per Lord Cairns, *Vyse* v. *Foster* (1874), L. R. 7 H. L. at p. 336.

[2] Lindley, ii. 990, *n.*: "The writer is not aware of any instance in which such a decree has been worked out and has resulted beneficially to the person in whose favour it was made."

[3] As in *Jones* v. *Foxall* (1852), 15 Beav. 388.

[4] *Knox* v. *Gye* (1871-2), L. R. 5 H. L. 656, see per Lord Westbury.

Rule for distribution of assets on final settlement of accounts.

63. In settling accounts between the partners after a dissolution of partnership, the following rules are to be observed (subject as to the payments to partners to any special agreement):

Losses are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

The assets of the firm are to be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract.[1]

Explanation.—Deficiencies of capital, in what-

[1] Almost verbally from Lindley, i. 806. Compare the form of order fully stated in the judgment of the Judicial Committee, *Binney* v. *Mutrie* (1886), 12 App. Ca. 160, 165. Where partnership assets are administered by the Court in an action, debts from the firm to a partner are payable out of the assets before the costs of the action: *Potter* v. *Jackson* (1880), 13 Ch. D. 845.

ever shares originally contributed by the partners, are to be treated, subject to any special agreement, as partnership losses.[1]

[1] *Nowell* v. *Nowell* (1869), 7 Eq. 538; *Whitcombe* v. *Converse* (1875), 119 Mass. 38. In other words, money due from the firm to a partner in respect of capital contributed, not being a distinct advance, is differently treated from money due for advances only in the one point of ranking after it. In itself it is a partnership debt, to be made up by contribution, if the assets are insufficient, in the same way as other partnership losses.

PART III.

Procedure and Administration.

CHAPTER IX.

Procedure in Actions by and against Partners.

Chap. IX. Art. 64.

Partners may sue and be sued in name of firm.

64. "ANY two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct. Provided that, in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable."[1]

[1] Rules of the Supreme Court, Ord. XVI. r. 14 (No. 136). The words "of which such persons were co-partners at the time of the

Chap. IX. Art. 65.

Sole trader under firm name.

The Rules also provide for the case of "any person carrying on business in the name of a firm apparently consisting of more than one person" being sued in the firm-name. The writ may be served at the principal place of business in the same way as under Order IX. r. 6 (Art. 65, below: Order IX. r. 7). The person sued is to appear in his own name, but subsequent proceedings continue in the name of the firm: Order XII. r. 16.

Discovery of individual partners in actions by firm.

65. "When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings

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accruing of the cause of action," introduced on the revision of the Rules of Court in 1883, remove a troublesome doubt which had arisen on the former language of the Rule. See *Ex parte Young* (1881), 19 Ch. Div. 124; *Munster* v. *Railton* (1883), 11 Q. B. Div. 435, in H. L. nom. *Munster* v. *Cox* (1885), 10 App. Ca. 680.

shall nevertheless continue in the name of the firm."[1]

Service of writ in action against firm.

66. "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there."

Subject to compliance in other respects with the Rules of Court, such service is good service upon the firm.[2]

Appearance of partners individually.

67. "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names: but all subsequent proceedings shall nevertheless continue in the name of the firm."[3]

Execution upon judgment against the firm.

68. "Where a judgment or order is against a firm,[4] execution may issue:

"*a.* Against any property of the partnership:

"*b.* Against any person who has appeared in his own name under Order XII. Rule 15, or who has admitted on the

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[1] Order VII. r. 2 (No. 43).

[2] Order IX. r. 6 (No. 53).

[3] Order XII. r. 15 (No. 85). Where only one member of the firm enters an appearance, judgment cannot be signed against the firm for default of appearance: *Adam* v. *Townend* (1884), 14 Q. B. D. 103.

[4] It must be in this form if the writ in the action was issued against the partnership in the firm-name: *Jackson* v. *Litchfield* (1882), 8 Q. B. Div. 474.

Chap. IX. Art. 68.

pleadings that he is, or who has been adjudged to be, a partner:

"*c.* Against any person who has been served as a partner[1] with the writ of summons and has failed to appear.

"If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do: and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."[2]

The new procedure does not recognize the firm as a distinct person.

These rules, it will be observed, do not introduce anything that amounts to the recognition of the firm as an artificial person distinct from its members.[3] They allow the name of the firm to be used for the purpose of making procedure quicker and easier; and creditors of a firm have now the great practical convenience of being able to pursue their claims even to judgment without first ascertaining who all the partners are. The substantive results, however,

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[1] This means actual service on that person: *Ex parte Ide* (1886), 17 Q. B. Div. 755, 758.

[2] Order XLII. r. 10 (No. 588).

[3] "We have not yet introduced into our law the notion that a firm is a *persona*." James, L. J., *Ex parte Blain*, 12 Ch. Div. at p. 533 (1879). The changes in language in the Rules of 1883 rather tend to make it plainer than before that such was not the intention of the Judicature Acts.

are the same as under the former practice; and a judgment against the firm has precisely the same effect that a judgment against all the partners had formerly. An action may be brought on the judgment against an individual member of the firm who is not admitted on the pleadings to be a partner.[1] Nor is it quite clear that actions between a firm and one of its own members, or between two firms having a common member, are now maintainable in the firm-name or names in England, as they always have been in Scotland:[2] Lord Justice Lindley, however, is of opinion that the allowance of them is involved in the new procedure.[3]

Garnishee orders.

Order XLV. does not enable a garnishee order to be made for the attachment of a debt due from a firm described by its firm-name, as no means of serving or enforcing such an order are provided.[4]

Adjudication and process in bankruptcy.

In bankruptcy an order of adjudication cannot be made against a firm in the firm-name. It must be made against the partners individually.[5] A creditor who has obtained judgment against the firm, but has not got leave to issue individual execution under this order, cannot issue a bankruptcy notice under the Act of 1883 against individual members of the firm.[6]

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[1] *Clark* v. *Cullen* (1882), 9 Q. B. D. 355. But where an action commenced against the firm is prosecuted against one partner only, and judgment taken against him by consent, the plaintiff is not allowed to turn his judgment, by amendment, into a judgment against the firm in order to issue execution against another alleged partner: *Munster* v. *Cox* (1885), 10 App. Ca. 680.

[2] See Second Report of Mercantile Law Commission, p. 18, and Appendix B thereto, p. 141; Bell, Principles of Law of Scotland, § 357.

[3] See p. 23 above.

[4] *Walker* v. *Rooke* (1881), 6 Q. B. Div. 631.

[5] General Rules of 1884, 197.

[6] *Ex parte Ide* (1886), 17 Q. B. Div. 755.

CHAPTER X.

Procedure in Bankruptcy against Partners.

Chap. X. Art. 69.

Consolidation of proceedings under joint and separate petitions.

69. "WHERE two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings, or any of them, on such terms as the Court thinks fit."[1]

Illustration.

A. and B. are partners in trade, A. being the sole managing partner. C., a creditor of the firm, presents a bankruptcy petition against A. alone. Before the hearing of this petition C. presents another petition against A. and B. jointly. The Court will consolidate the proceedings under the separate petition with those under the joint petition.[2]

Creditor of firm may present petition against one partner.

70. "Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others."[3]

Court may dismiss petition as to some respondents only.

71. "Where there are more respondents than one to a petition, the Court may dismiss

[1] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 106.

[2] *Ex parte Mackenzie* (1875), 20 Eq. 758.

[3] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 110.

the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them."[1]

One trustee for property of partners in one firm separately bankrupt.

72. "Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just."[2]

Creditor of firm may prove in separate bankruptcy for purpose of voting.

73. "If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat."[3]

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[1] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 111.

[2] *Ib.* s. 112. When a trustee of the joint estate is duly appointed, the separate estates also vest in him at once: *Ex parte Philps* (1874), 19 Eq. 256; *Re Waddell's Contract* (1876), 2 Ch. D. 172; and see *Ebbs* v. *Boulnois* (1875), 10 Ch. 479.

[3] *Ib.* sched. 1, rule 13. As to the distribution of the estates, see further, Articles 76-79, below.

Chap. X. Art. 74.

Dividends of joint and separate properties.

74. "(1.) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

(2.) "Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested,[1] be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for, and the benefit received by each property."[2]

Actions by trustee and solvent partners.

75. "Where a member of a partnership is adjudged bankrupt, the Court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause

[1] See *Ex parte Dickin* (1875), 20 Eq. 767.

[2] Bankruptcy Act, 1883, s. 59.

against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs."[1]

[1] *Ib.* s. 113.

CHAPTER XI.

Administration of Partnership Estates.

Chap. XI. Art. 76.

General rule of administration as to joint and separate estate.

76. In the administration by the High Court of Justice of the estates of deceased partners and of bankrupt and insolvent partners, the following rules are observed:—

The partnership property is applied as *joint estate* in payment of the debts of the firm,[1] and the separate property of each partner is applied as *separate estate* in payment of his separate debts.

After such payment the surplus, if any, of the joint estate is applied in payment of the separate debts of the partners, or the surplus, if any, of the separate estate is applied in payment of the debts of the firm.

Illustrations.

1. A. and B. are in partnership. A. dies, and his estate is administered by the Court. Both A.'s estate and B. are solvent. Here A.'s separate creditors and the creditors of A. and B.'s firm may prove their debts against A.'s estate and be paid out of his assets *pari passu* and in the same manner.

[1] That is, to persons other than partners: see Art. 79.

The payments thus made to creditors of the firm must then be allowed by B. in account with A.'s estate as payments made on behalf of the firm, and A.'s estate will be credited accordingly in ascertaining what is A.'s share of the partnership property.[1]

2. The facts being otherwise as in the last illustration, A.'s estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner, B. Here B. will become a creditor of A.'s separate estate for the amount of the partnership debts paid by B. beyond the proportion which he ought to have paid under the partnership contract.[2]

3. If B. is also insolvent, the creditors of the firm must resort in the first instance to the partnership property, and can only come against so much of the separate property of the partners as remains after paying their separate creditors respectively: and the same rule applies if both A. and B. have died before the administration takes place.[3]

4. A. and B. are partners. A. dies, and B. afterwards becomes bankrupt. M., a creditor of the firm, proves his debt in B.'s bankruptcy, and receives some dividends which satisfy it only in part. A.'s estate is administered by the Court, and M. proves in that administration for the residue of his debt. Separate creditors of A. also prove their debts. M. has no claim upon A.'s estate until all the separate creditors of A. have been paid.[4]

5. A. and B. are partners under articles which provide that, in the event of A.'s death during the partnership, B.'s interest in the profits shall thenceforth belong to A.'s representatives, B. receiving a sum equivalent to his share of profits for six months, to be ascertained as therein provided, and the amount of his capital. A. dies, having appointed B. his executor. B. carries on the business for some time, and then becomes a liquidating debtor. The partnership property existing at the date of A.'s death is not converted into A.'s separate property

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[1] *Ridgway* v. *Clare* (1854), 19 Beav. at p. 116.

[2] *Ibid.*

[3] *Ib.* at pp. 116, 117.

[4] *Lodge* v. *Prichard* (1863), 1 D. J. S. 610.

Chap. XI. Art. 76.

by the provisions of the partnership articles, and such property, so far as it is still found in B.'s hands at the time of liquidation, is applicable in the first instance as joint estate to pay the creditors of the firm.[1]

6. A. and B. are partners for a term, A. not having brought in any capital, but receiving a share of the profits as a working partner. The partnership deed provides that, if A. dies during the term, his representatives shall receive only an apportioned part of his estimated share in the profits for the current half-year. A. dies during the term, and B. afterwards becomes bankrupt. Here B. takes the partnership property subject to the right of A.'s estate to be indemnified against the partnership debts, and the property of the firm of A. and B., so far as it is found still existing in B.'s hands, must be first applied to pay the creditors of the firm.[2]

7. A., B., C. and D. are partners for a term under articles which provide that the death of any one of them shall not dissolve the partnership, but the survivors or survivor shall carry on the business, and the share of the deceased partner shall be ascertained and paid out as therein provided. A. and B. die during the term, and afterwards C. and D. become liquidating debtors. Here, as the interest of a deceased partner wholly passes to the survivors on his death under the special and exceptional provisions of the partnership articles, the creditors of the original firm of A., B., C. and D. have no right to have the property of that firm, so far as it is found still existing in the hands of C. and D., applied in payment of their debts in preference to the creditors of the new firm of C. and D.[3]

Dicta laying down the rule.

This rule has been repeatedly laid down in its general form as a well-established one.

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[1] *Ex parte Morley* (1873), 8 Ch. 1026. Compare *Ex parte Butcher* (1880), 13 Ch. Div. 465, a similar case, in which this decision was followed.

[2] *Ex parte Dear* (1876), 1 Ch. Div. 514.

[3] *Re Simpson* (1874), 9 Ch. 572. This was a peculiar case. The last three Illustrations really belong to Art. 30 (which see) as much as to this; but it seemed on the whole more convenient to give them here.

"Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it."[1]

"The joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other;" and this applies to the administration of estates in Equity as well as in Bankruptcy.[2]

"The joint estate must be applied first in payment of joint creditors, and the separate estate in payment of separate creditors, and only the surplus of each estate is to be applied in satisfaction of the other class of creditors."[3]

And now it is declared by statute in the Bankruptcy Act, 1883, s. 40, sub-s. 3:

"In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate."

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[1] *Rolfe* v. *Flower* (1866), L. R. 1 P. C. at p. 48.

[2] *Lodge* v. *Prichard* (1863), 1 D. J. S. at pp. 613, 614, per Turner, L.J. The Supreme Court of Judicature Act, 1875, s. 10, assimilates the rules of administration of deceased persons' estates to those "in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt:" apart from this enactment, however, the practice was already so settled on the point now in question.

[3] *Ex parte Dear* (1876), 1 Ch. Div. at p. 519, per James, L.J.; *Ex parte Morley* (1873), 8 Ch. at p. 1032.

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The subject was also carefully considered by Lord Romilly in *Ridgway* v. *Clare*.[1] The rules there laid down by him for the various cases which may occur have been given above in the form of illustrations.

Rule of Indian Contract Act.

The Indian Contract Act (s. 262) gives the rule as follows:—

"Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm; and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm." This section is general in its terms, and not confined to the administration of partners' estates by the Court. It seems intended to cover the doctrine of *partners' lien*, to which we have given a distinct place (Art. 56, above).

The rule empirical and doubtful in principle.

The rules of administration as between the creditors of the firm and the separate creditors of the partners have been settled, and adhered to after much hesitation in the earlier cases, as "a sort of rough code of justice,"[2] and as an empirical way of dealing with a pressing necessity, rather than as being reasonable in themselves.[3] They

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[1] 19 Beav. 111 (1854).

[2] Per James, L.J., *Lacey* v. *Hill* (1872), 8 Ch. at p. 444.

[3] "It is extremely difficult to say upon what the rule in bankruptcy is founded:" per Lord Eldon, *Gray* v. *Chiswell* (1803), 9 Ves. at p. 126; to the like effect in *Dutton* v. *Morrison* (1810—1), 17 Ves. at p. 211; see, too, *Lodge* v. *Prichard* (1863), 1 D. J. S. 613, per Turner, L.J. Story (on Partnership, §§ 377, 382) says that it "rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence:" Kent, on the other hand (Comm. iii. 65), thinks it on the whole a reasonable

give, in fact, results altogether at variance with the mercantile system of settling the accounts of a firm, which proceeds upon the mercantile conception of the firm as a person distinct from its partners. On the mercantile plan the debts of the partners to the firm, as ascertained on the ordinary partnership accounts, are payable on the same footing as their other debts; and if this rule were applied by the Court, the joint estate might prove against the separate estate of any partner in competition with the separate creditors for the balance due from him to the firm. The creditors of the firm would thus be in a far better position than they are at present. As it is, the partners may have considerable separate property, and be largely indebted to the firm, and yet their separate creditors may be paid in full, while the creditors of the firm get hardly anything.[1]

Mercantile plan of administration.

The law of Scotland does treat the firm as a separate person, and so far agrees with the usage of merchants; but on the point now before us it differs from the mercantile scheme of accounts as well as from the law of England. The rule is, that "upon the sequestration of co-partners their separate estates are applicable to the payment *pari passu* of their respective separate debts, and of

Law of Scotland.

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one. Lord Blackburn has all but said that it was invented merely to save trouble. "The reason was, I take it, not upon the ground that there was a right in the private creditors to be paid out of the separate estate, or a right in the joint creditors to be paid out of the joint estate, for I do not think that there was any such rule; but it was said the rule was to be adopted, partly, at least, on the ground of convenience in administering the bankruptcy law. It was thought that the administration of the bankruptcy law could not be conveniently carried out if the estates were to be mixed. Whether that was a right notion or not I do not know:" *Read* v. *Bailey* (1877), 3 App. Ca. at p. 102.

[1] See the extract from Cory on Accounts given in Lindley, ii. 1167.

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so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company [*i.e.* partnership] debt, in claiming upon the sequestrated estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for the balance."[1] This is less favourable to partnership creditors than the mercantile rule, though more so than the English rule, and it is more complicated in working than either. The English rule was preferred to the Scottish by most of the persons and bodies who returned answers to the Mercantile Law Commission; whereas, on the other matters of difference between the partnership law of the two countries, the opinions given were almost unanimous in favour of the law of Scotland.

In France no express directions on this point are given by the Civil or Commercial Code. The prevailing opinion seems to be that the creditors of the firm have a prior claim on the partnership property, and may also come upon the separate property in competition with the separate creditors:[2] and this is the rule expressly adopted by the Swiss Federal Code of Obligations, Arts. 566 and 568.

The German Commercial Code (Art. 122) makes the joint estate (Gesellschaftsvermögen) applicable in the first instance to pay the debts of the firm: the rights of joint and separate creditors respectively against the separate estates are left to be dealt with by the municipal laws (Landesgesetzen) of the several German States.

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[1] Second Report of Mercantile Law Commission, Appendix A, p. 99. It must be remembered that in Scotland the firm can be bankrupt without the partners being bankrupt.

[2] Troplong, Droit Civ. Expl., Contrat de la Société, tom. 2, nos. 857—863; Sirey, Codes Annotés, on Code Civ. 1864, nos. 10—12.

Exceptional rights of proof in certain cases. When creditors of firm may prove against separate estate.

77. Notwithstanding the last foregoing article, a creditor of the firm may prove his debt in the first instance against the separate estate of a partner if the debt has been incurred by means of a fraud practised on the creditor by the partners or any of them.[1]

Illustration.

A. and B., trading in partnership, induce C. to accept bills of exchange to a large amount by representing them as drawn to meet purchases of cotton on the joint account of A. and B.'s firm and C. The cotton has never been really bought. A. and B. become bankrupt. C. is entitled to prove at his election against the joint estate or the separate estates.[2]

Other exceptions abrogated.

There were formerly two or three other exceptions to this rule, of a doubtful and capricious kind, which are now understood to be tacitly abolished by sect. 40 of the Bankruptcy Act, 1883. They were stated in preceding editions of this book.

Where joint estate may prove against separate estates or estate of minor firm.

78. Notwithstanding Article 76, the trustee of the joint estate of a bankrupt firm may

[1] *Ex parte Adamson* (1878), 8 Ch. Div. 807, *diss.* Bramwell, L.J. The principle seems to be this: the creditor may proceed at his election against the joint estate for the partnership debt, or against the separate estates for the equitable liability to restore the money obtained by fraud. This liability constitutes a provable debt, being treated apparently as a liquidated duty *quasi ex contractu*. And the right seems to be the same against the separate estate of a partner personally innocent of the fraud; *Ex parte Salting* (1883), 25 Ch. Div. 148, where the point was not decided, as the partner had given a separate guaranty.

[2] *Ex parte Adamson* (1878), 8 Ch. Div. 807.

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prove[1] against the separate estate of any partner, or the joint estate of any distinct firm composed of or including any of the partners in the principal firm, debts arising out of either of the following states of fact:—

1. Where that partner or distinct firm has dealt with the principal firm in a business carried on by such partner or distinct firm as a separate and distinct trade, and the principal firm has become a creditor of such partner or distinct firm in the ordinary way of such dealing:[2]

2. Where that partner has fraudulently converted partnership property to his own use[3] without the consent or subsequent ratification of the other partner or partners.[4]

Illustrations.

1. A., B., C., D. and E. are bankers in partnership at York, and A., B., C. and D. are bankers in partnership at Wakefield. A balance is due to the York firm from the Wakefield

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[1] That is, on behalf of the creditors of the firm.

[2] Lindley, ii. 1201.

[3] *Ib.* 1198.

[4] The comparison of *Ex parte Harris* (1813), 2 V. & B. 210, and 1 Rose, 437, with *Ex parte Yonge* (1814), 3 V. & B. 31; 2 Rose, 40, and the judgment of Jessel, M.R., in *Lacey* v. *Hill* (1876), 4 Ch. D. 537, affirmed in the House of Lords, nom. *Read* v. *Bailey* (1877), 3 App. Ca. 94, seems to give this as the true form of the rule. For further remarks see on Art. 79 below. Lord Eldon's own terms, several times repeated in *Ex parte Harris*, are "knowledge, consent, privity or subsequent approbation." I have ventured to act on Sir G. Jessel's intimation in *Lacey* v. *Hill* that fewer words would probably have done as well.

firm on account of dealings between the two banks in the ordinary course of banking business. The York firm, and therefore also the Wakefield firm, becomes bankrupt. The trustee of the York firm may prove against the estate of the Wakefield firm for this balance.[1]

2. A. and B. become partners from the 1st of January. Under the articles all partnership moneys are to be paid into their joint names at a particular bank, and each partner may draw out £50 a month for his own use. An account is opened at the bank in the joint names of A. and B., and partnership moneys are paid into it. On the 1st of February A. draws out £550 instead of £50 without the knowledge of B., and the firm shortly afterwards becomes bankrupt. The trustee of the joint estate may prove against A.'s separate estate for £500.[2]

3. A. and B. are partners under articles which provide that money received by either of them on the partnership account shall be paid monthly into a certain bank, and that each partner may draw out £50 per month for his own use. A. is the acting partner, and with the knowledge of B. pays the moneys received by him on the partnership account into his private account at his own banker's, and B. himself pays some partnership moneys into A.'s account. A. draws on the partnership funds so standing to his own account beyond the amount permitted by the articles, and also retains other partnership funds in his hands, and applies them to his own use without ever paying them in. The firm becomes bankrupt. The trustee of the joint estate cannot prove against the separate estate of A. for the moneys drawn out in excess or not paid in, as B. has by his conduct allowed A. to have the sole dominion over the partnership funds, and must be taken to have consented to the unlimited exercise of that dominion.[3]

4. [A. and B. are partners, A. being the sole acting partner. A. pays out of the partnership property private debts of his

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[1] *Ex parte Castell* (1826), 2 Gl. & J. 124.

[2] Per Lord Eldon, *Ex parte Harris* (1813), 2 V. & B. at p. 214.

[3] *Ex parte Harris* (1813), 2 V. & B. 210, and less fully in 1 Rose, 437. "The necessary effect of the transaction being to give the dominion over the whole fund to one . . . the other must be taken to have consented to that dominion:" 2 V. & B. at p. 215.

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own and other debts for which, under the provisions of the partnership articles, not the firm but A. separately is liable. The firm afterwards becomes bankrupt. The trustee of the joint estate cannot prove for the amount of these debts against the separate estate of A., since A.'s conduct does not amount to a *fraudulent* conversion of partnership property to his own use.[1]]

5. A., B. and C. are partners in a bank, A. being the sole managing partner. The articles contain clauses against overdrawing. A. draws large sums from the funds of the bank by means of fictitious credits and forged acceptances, and thereby conceals from B. and C. (who trust A.'s statements without making further inquiry) the fact that he has overdrawn his private account in contravention of the partnership articles. A. dies, and shortly afterwards B. and C. become bankrupt. The trustee of B. and C.'s joint estate may prove against A.'s estate for the amount of the partnership moneys misapplied by him.[2]

Rule against proof by partners in competition with creditors.

79. Where the joint estate of a firm or the separate estate of any partner is being adminis-

[1] *Ex parte Lodge and Fendal* (1790), 1 Ves. Jr. 166, and see 2 V. & B. 211, *n.*, and Cooke's Bankrupt Laws, 530, 8th ed. The opinion of the Court was at first the other way, and the case has been considered one of great hardship; see the judgment in *Ex parte Yonge* (1814), 3 V. & B. 31, 34; 2 Rose, 40. It is difficult to understand the real grounds of the decision from the report itself; but it must now be taken that the case was one of the same class as *Ex parte Harris* (1813). See the comments on it in the judgment there, 2 V. & B. at p. 213, and *Ex parte Hinds* (1849), 3 De G. & Sm. at p. 615, and by Lord Blackburn in *Read* v. *Bailey* (1877), 3 App. Ca. at p. 103, who deals with it thus: "I collect that in that case the dormant partner had, by deed, given the acting partner who carried on the business the amplest authority to invest the money in any way he pleased, and he pleased to invest it by lending it to himself, to pay his private debts. That was a very wrong thing indeed; it was, as Lord Eldon afterwards expressed it, an abuse of his authority—a most improper use of his authority—but he did act upon the authority."

[2] *Lacey* v. *Hill* (1876), 4 Ch. Div. 537, affirmed in the House of Lords, nom. *Read* v. *Bailey* (1877), 3 App. Ca. 94.

tered, no partner in the firm may prove in competition with the creditors of the firm either against the joint estate of the firm[1] or against the separate estate of any other partner[2] until all the debts of the firm have been paid.

Explanation.—This rule applies to a person who, not being in fact a partner, has, by holding himself or allowing himself to be held out as a partner, become liable as such to the creditors of the firm generally,[3] but not to one who has so become liable to some only of the creditors.[4]

A married woman who lends money out of her separate property to a firm of which her husband is a member can (if the loan is really and not colourably a loan to the firm as distinct from the husband in person) prove against the joint estate like any other creditor. Sect. 3 of the Married Women's Property Act, 1882, cannot be extended so as to put her in the position of a partner, and bring her within this or an equivalent rule.[5]

Exceptions in special circumstances.

Exceptions.—Partners may nevertheless prove against the joint estate of the firm or the separate estate of a partner, as the case may be, for

[1] Lindley, ii. 1187.

[2] *Ib.* 1202.

[3] *Ex parte Hayman* (1878), 8 Ch. Div. 11.

[4] *Ex parte Sheen* (1877), 6 Ch. Div. 235. In the one case there is an ostensible partnership apparent to the public, in the other only circumstances creating at most a liability towards particular persons.

[5] *Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88.

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debts which have arisen under any of the following states of fact :—

1. Where two firms having one or more members in common, or a firm and one of its members, have carried on business in separate and distinct trades and dealt with one another therein, and the one firm or trader has become a creditor of the other in the ordinary way of such dealing :[1]

2. Where the separate property of a partner has been fraudulently converted to the use of the firm,[2] or property of the firm has been fraudulently converted to the use of any partner,[3] without the consent or subsequent ratification of the partner or partners not concerned in such conversion :[4]

3. Where, having been bankrupt, a partner has been discharged, and has afterwards become a creditor of the firm[5] [or of another partner[6]].

Illustrations.

1. A., B. and C. are partners under articles which provide that, if any partner dies, his share shall be taken by the surviving partners at its value according to the last stock-taking, with interest at 5 per cent. on its amount in lieu of

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[1] Lindley, ii. 1191, 1203.
[2] Per Lord Eldon, *Ex parte Sillitoe* (1824), 1 Gl. & J. at p. 382.
[3] Lindley, ii. 1198.
[4] See Note 4, p. 142, above.
[5] Lindley, ii. 1190.
[6] This case would presumably follow the analogy of the other.

profits up to the day of his death, and shall be paid out by instalments. A. dies, and after his death, and before the ascertained value of his share has been paid to his executors, B. and C. become bankrupt. A.'s executors cannot prove against the joint estate of the firm for the amount due to them in respect of A.'s share till all other debts of the firm contracted during A.'s lifetime are paid.[1]

2. If, the other facts being as in the last illustration, all debts of the firm contracted in A.'s lifetime have been paid before the bankruptcy, A.'s executors may prove for the full amount; for here they are not competing with any creditor of A.[2]

3. A. and B. are partners. The partnership is dissolved by agreement, A. giving B. a bond for £10,000 and interest, and B. transferring to A. all his interest in the partnership. A. and a third person, C., also covenant to pay the debts of the firm. A. becomes bankrupt. B. assigns his separate property to trustees for the benefit of the creditors of the firm. The trustees under this assignment cannot prove the bond debt against A.'s estate until all the debts of the firm are paid, or unless the creditors of the firm accept the assignment of B.'s property as payment in full and release the joint liability of A. and B.[3]

4. A. and B. are partners. The firm becomes bankrupt. Before the bankruptcy A. is indebted to B. upon a contract independent of the partnership. It is known that there will be no surplus of A.'s separate estate after satisfying his separate debts, whether B.'s debt is admitted to proof or not. B. may prove his debt against A.'s separate estate, as he does not thereby compete with any creditor of the firm.[4] It is doubtful whether he might so prove it if A.'s separate estate were solvent.[5]

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[1] *Nanson* v. *Gordon* (1876), 1 App. Ca. 195, affirming s. c. nom. *Ex parte Gordon* (1874), 10 Ch. 160.

[2] *Ex parte Edmonds* (1862), 4 D. F. J. 488. The fact that the joint debts had been paid appears by the head-note.

[3] *Ex parte Collinge* (1863), 4 D. J. S. 533.

[4] *Ex parte Topping* (1865), 4 D. J. S. 551.

[5] *Lacey* v. *Hill* (1872), 8 Ch. 441, 445.

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5. A. and B. are traders in partnership, A. being a dormant partner. They dissolve the partnership by agreement, and B. takes over the business of the firm, and is treated by its creditors as their sole debtor. On the dissolution an account is stated between A. and B. which shows a balance due to A. Afterwards A. sues B. for the amount, the action is undefended, and A. signs judgment for the debt and costs. Some time after this B. becomes bankrupt. A. can prove this debt in B.'s bankruptcy, because the partnership debts have been converted into the separate debts of B., and B.'s debt to A. on the account stated is a purely separate debt.[1]

6. A. and B. are partners. A. also carries on a separate trade on his own account, and in that trade sells goods to the firm of A. and B. The firm of A. and B. becomes bankrupt. A. may prove against the joint estate for the balance due on the dealings between A. in his separate business and the firm of A. and B.[2]

7. A., B., C. and D. are bankers in partnership under the firm of C. & Co. A. and B. are ironmongers under the firm of A. & Co. A. and B. indorse in the name of A. & Co. bills remitted to them by C. & Co., and procure them to be discounted on the credit of this indorsement; they also draw bills in the name of A. & Co. for the use of C. & Co. The firm of C. & Co. becomes bankrupt. A. and B. cannot prove against the joint estate for the balance due to them on these transactions, as their dealings with C. & Co. were not in the course of their separate trade, but only "for the convenience of the general partnership."[3] The same rule applies even if A. & Co. are bankers.[4]

8. A., B. and C. are bankers in partnership. C., the managing partner, becomes bankrupt. A balance is due from him to the firm on the partnership account, and he has also obtained large sums of money on bills drawn and indorsed by him in the name of the firm, and applied the money

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[1] *Ex parte Grazebrook* (1832), 2 D. & Ch. 187; see the explanation in Lindley, ii. 1205.

[2] *Ex parte Cook* (1831), Mont. 228.

[3] *Ex parte Sillitoe* (1824), 1 Gl. & J. 374.

[4] *Ex parte Maude* (1867), 2 Ch. 550.

to his own use, and A. and B. have been compelled to take up the bills. A. and B., having paid all the debts of the firm existing at the date of the bankruptcy, may prove in C.'s bankruptcy for the amount thus received and misapplied by him.[1]

9. A. and B. are partners under articles which provide that, if A. dies during the partnership, B.'s share in the business shall belong to A.'s representatives. A. dies during the partnership, having appointed B. and others his executors. B. is the sole acting executor, and continues the business. He receives income of the separate property of A., and employs it in the business without authority. A.'s estate is insolvent, and is administered by the Court. B. becomes bankrupt, and the joint estate of the late firm is administered in the bankruptcy. The receiver of A.'s estate may prove in the bankruptcy of B. for the moneys misapplied by B. as A.'s executor.[2]

10. A firm becomes bankrupt. One of the partners obtains his discharge, and afterwards takes up notes of the firm. He may prove for their amount against the joint estate.[3]

11. C. and K. are partners under the firm of C. & Co. C., without K.'s knowledge, procures G. and W. to establish a business under the firm of W. & Co., W. being the manager and holding himself out as a principal, and G. a trustee for C., who is the only real principal. Dealings take place between the firms of C. & Co. and W. & Co., and the firm of W. & Co. becomes indebted to the firm of C. & Co. for goods sold and money lent in the ordinary course of business. These dealings are not known to K. Both C. & Co. and W. become bankrupt. Here C. & Co. cannot prove against W.'s estate, inasmuch as there is not any real debt.[4]

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[1] *Ex parte Yonge* (1814), 3 V. & B. 31, and 2 Rose, 40.

[2] *Ex parte Westcott* (1874), 9 Ch. 626.

[3] *Ex parte Atkins* (1820), Buck, 479.

[4] *Re Wakeham* (1884), 13 Q. B. D. 43. This is a singular case. As between C. and W. there was no real contract making W. liable to pay, since C. knew all the facts; as between K. and W. there might have been a contract by holding out if K. had known of the transactions at the time, but he did not; neither could K. get the benefit of C.'s ostensible contract by ratification, for there was nothing to ratify.

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Principles of exceptional right of proof where property has been wrongfully converted to the use of the firm or of a partner.

The exceptional right of proof in cases where there has been a wrongful conversion of partnership property to the use of one partner or *vice versa* is established by comparatively early authorities which settle the principle, but are not very clear in their language, and leave sundry questions open as to the limits of the rule. It is somewhat unfortunate that *Ex parte Lodge and Fendal*[1] acquired the reputation of being a leading case on the subject; for the facts are not stated in sufficient detail, and the ultimate decision is nowhere fully reported. The real leading case appears rather to be *Ex parte Harris*,[2] which was in fact so treated in *Lacey* v. *Hill*.[3]

In this last case the whole question is dealt with, and especially the judgment of Sir G. Jessel, then Master of the Rolls, greatly lessens the difficulty of giving a complete and exact statement of the law.

The points specially considered were the following:—

Fraud in strict sense need not be proved.

First, what is a fraudulent conversion of partnership property to a partner's separate use[4] within the meaning of the rule? A wilfully dishonest intention, or conduct, which, in the language of Lord Eldon, adopted by Jessel, M.R., amounts to *stealing* the partnership property, is generally found to be present in these cases, but it need not be proved in every case.

"It is not," said Sir G. Jessel,[5] "necessary for the joint estate[4] to prove more than, in the words of Lord Eldon,[6] that this overdrawing was for private purposes, and without

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[1] 1 Ves. Jr. 166 (1790); see Note 1, p. 144, above.

[2] 2 V. & B. 210 (1813).

[3] See Note 2, p. 144, above; 4 Ch. Div. 537; nom. *Read* v. *Bailey* (1877), 3 App. Ca. 94.

[4] Everything here said is equally applicable, of course, to the converse case, which, however, is in practice very rare, if indeed it occurs at all.

[5] 4 Ch. D. at p. 543.

[6] *Ex parte Harris* (1813), 2 V. & B. at p. 214.

the knowledge, consent, privity, or subsequent approbation of the other partners. If that is shown, it is *prima facie* a fraudulent appropriation within the rule." Hence it would appear that the term fraud is used for the purposes of this rule in the wide sense formerly given to it by Courts of Equity. Lord Blackburn puts the question in a slightly different way: "Was this debt in respect of which the claim is sought to be made upon the separate estate contracted by the authority, expressed or implied, of the firm, though that authority might have been abused in contracting it, or was it done by fraud, without any authority, by an absolute fraudulent conversion of the property of the firm?"[1] It is said, again, that a mere excess in degree of an act authorized in kind, such as an overdraft entered in the books without concealment, is not fraud within the meaning of the rule.[2] These remarks do not seem to agree with the proposition laid down by Sir G. Jessel in its full extent; it was not necessary to define the point, as in the case before the Court the fraud was gross and elaborately concealed.

Consent or ratification may be by conduct: question of constructive notice.

Next, what will amount to implied authority? It must be admitted that one partner may give assent by conduct as well as by words to the uncontrolled and unlimited exercise of dominion over the partnership funds by the other, and that a general assent so given may have the same effect as regards the other partner's dealings with the funds as if those dealings had been severally and specially authorized. So much is established by the decision in *Ex parte Harris*.[3] But a distinct question remains, whether the doctrine of *constructive notice* applies

[1] 3 App. Ca. 104 (1877).

[2] Lord Cairns, 3 App. Ca. 99 (1877), and James, L.J., 4 Ch. Div. 553 (1876).

[3] 2 V. & B. 210 (1813).

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to these cases; in other words, whether means of knowledge on the part of the partner defrauded are equivalent to actual knowledge. If he might have discovered the misappropriation of partnership funds by using ordinary diligence in the partnership affairs, can he be deemed to have assented to the misappropriation? or (which seems a better way of putting it) is he estopped from saying that the misappropriation was not consented to or ratified by him? There is some show of authority in favour of an affirmative answer. Lord Eldon said, in *Ex parte Yonge*,[1] "If his partners could have known that he [the acting partner] had applied it to his own purposes from their immediate or subsequent knowledge upon subsequent dealing, their consent would be implied:" a dictum which, though far from lucid, seems in its most natural reading to lay down the doctrine that constructive notice or means of knowledge will have the same effect as actual consent or a ratification by words or conduct founded on actual knowledge. And in the much later case of *Ex parte Hinds*,[2] the judgment of the Commissioner, from which Knight Bruce, V.-C., did not dissent, proceeds without hesitation on this doctrine. The case was finally disposed of, however, on the ground that there was in fact no conversion at all, the investment in question, though unauthorized, having been made on the partnership account.

Decision in *Lacey* v. *Hill* that doctrine of constructive notice is not here applicable;

The contrary doctrine, on the other hand, was distinctly and positively laid down by Sir G. Jessel in *Lacey* v. *Hill*,[3] and does not appear to have been contested on the appeal to the House of Lords, the result of which was to affirm the decisions below in all points.[4] There must be, he said

[1] 3 V. & B. at p. 36 (1814).
[2] 3 De G. & Sm. 613, 616—7 (1849).
[3] 4 Ch. D. 537 (1876).
[4] *Read* v. *Bailey* (1877), 3 App. Ca. 94.

in effect, a real consent or acquiescence; and acquiescence means, not the existence of facts which may be said to amount to constructive notice, but standing by with knowledge—actual knowledge—of one's rights, both in fact and law. Neither can the result aimed at by the theory of constructive notice be obtained in another way by putting it on the ground of estoppel by negligence. A person who has committed gross fraud—or his creditors who stand in his place—cannot be heard to complain of the negligence of the person defrauded in not finding out the fraud sooner. The language of the judgment leaves room for the suggestion that this does not apply to a case where there is not actual fraud in the strict sense, a *stealing* of the partnership funds; so that in such a case it may still be arguable that means of knowledge will do. But there is hardly room for a distinction of this kind when the misappropriation such as to give a right of proof is once established. Absence of concealment and facilities for discovery by the other partners are material, if at all, rather on the preliminary point whether the dealing was indeed fraudulent, as in the case put in the Court of Appeal of overdrafts being truly entered in the books in the usual way.

nor that of estoppel by negligence.

It was further argued in *Lacey* v. *Hill* that, in order to establish the right of proof against the separate estate, it was necessary to show that the separate estate (that is, the fund available for the separate creditors) had been actually increased by the sums misappropriated. This argument, apparently a novel one, found no favour with the Court. A man's separate estate is increased by any increase of his private means; increasing his own means out of the partnership estate, whatever he does with the funds so taken, is in fact increasing his separate estate. "Whether the separate estate has in the result been increased or not—

Chap. XI. Art. 79.

whether at the time of the proof it is larger than it otherwise would have been or not—is a matter which does not concern the application of the rule, and it is sufficient that at one time the separate estate was increased when the property was thus fraudulently converted and taken for the purpose of one partner."[1] The Court has nothing to do with tracing the subsequent fate of the sums misappropriated: if in any particular case they could be traced and identified in a specific investment, the right of the joint estate would be of a different kind; there would be a case, not for proof, but for restitution.[2]

Ordinary right of creditors against deceased partner's estate.

It will be remembered that apart from these special rules a partnership creditor is always entitled to a remedy against the estate of a deceased partner concurrently with his right of action against any surviving partner, but subject to the prior claim of the deceased partner's separate creditors; and that it is immaterial in what order these remedies are pursued if the substantial conditions of not competing with separate creditors, and of the surviving partner being before the Court, are satisfied in the proceedings against the deceased partner's estate.[3]

Double proof where distinct causes of action.

It will also be observed that where a joint liability and one or more separate liabilities are created in different rights in the course of the same transaction, there is no rule against the concurrent enforcement of both. Trustees of a settlement paid money for the purpose of a specific investment to a firm of solicitors in which one of the trustees was a partner; that firm misapplied the money and became bankrupt; the new trustees were admitted to

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[1] Lord Cairns, 3 App. Ca. 100 (1877).

[2] 4 Ch. Div. 545.

[3] *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. Div. 177, and see Art. 14 above.

prove both against the separate estate of the defaulting trustee in respect of his breach of trust, and against the joint estate of the firm in respect of their contract to invest or restore the money (these being distinct and independent obligations), without deciding whether the contract of the firm was not of itself joint and several.[1]

Rights of joint creditors holding separate security, or conversely.

80. Any creditor of a firm holding a security for his debt upon separate property of any partner may prove against the joint estate of the firm, and any separate creditor of a partner holding a security for his debt upon the property of the firm may prove against that partner's separate estate, without giving up his security: provided that the creditor must in no case receive in the whole more than the full amount of his debt.[2]

Explanation. — Representations made to a creditor by the partner or partners giving him a security that the property on which the security is given is separate, or is the property of the firm, as the case may be, do not affect or extend the application of this rule.[3]

Illustrations.

1. A., B. and C. are partners, and open a banking account

[1] *Re Parker, Ex parte Sheppard* (1887), 19 Q. B. D. 84.

[2] *Re Plummer* (1841), 1 Ph. 56, 60; *Rolfe* v. *Flower* (1866), L. R. 1 P. C. at p. 46; Lindley, ii. 1183, 1213. For the general rule as to the treatment of secured debts in bankruptcy, see *Ib.* 1181, and Schedule 2 to the Bankruptcy Act, 1883; also *Couldery* v. *Bartrum* (1880—1), 19 Ch. Div. 394; *Société Générale de Paris* v. *Geen* (1883), 8 App. Ca. 606.

[3] See Illustration 4.

Chap. XI. Art. 80.

with D. The bank makes advances to the firm on the security of the joint and several promissory note of A., B. and C. Afterwards A. gives the bank a mortgage of separate property of his own to secure the balance then due and future advances to a limited extent. The firm becomes bankrupt, being at the time indebted to the bank beyond the amount covered by the promissory note and mortgage respectively. After realizing the mortgage security, D. may prove against the joint estate upon the promissory note for the balance of the debt.[1]

2. A. is in partnership with his son, B. They execute to a partnership creditor, C., a joint and several bond for his debt, and A. also gives C. an equitable mortgage on land which is his separate property. The partnership is afterwards dissolved. A. dies intestate, and B. becomes bankrupt. The partnership debts and A.'s other debts are of such an amount that, apart from this mortgage debt, A.'s estate would be insolvent. Here C. may prove his debt in B.'s bankruptcy without giving up his security, as B. has no beneficial interest in the mortgaged estate, and C.'s security is therefore not on B.'s estate.[2]

3. A. and B. are partners. The firm keeps a banking account with C. & Co., with whom A. likewise keeps a separate account. A. deposits with the bank the title-deeds of separate property of his own, to secure the balance of account due or to become due from him, either alone or together with any one in partnership with him. The firm of A. and B. becomes bankrupt. Both the account of the firm and A.'s separate account are overdrawn. C. & Co. may prove against the joint estate for the whole balance due from the firm to the bank, and apportion the proceeds of the security on A.'s property between the balance due from the firm and that due from A. as they think fit, allowing for what comes to them under the proof against the joint estate.[3] C. & Co. may also prove against A.'s separate estate for the residue of A.'s separate

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[1] *Ex parte Bate* (1838), 3 Deac. 358.

[2] *Ex parte Turney* (1844), 3 M. D. & D. 576.

[3] For this purpose they may apply to the Court to have a dividend declared first on the joint estate under s. 59 of the Bankruptcy Act, 1883: see Art. 74, above.

debt to them, after deducting the apportioned part of the proceeds of the security.[1]

4. A. and B. are partners. A. is a shareholder in a bank incorporated under the Companies Acts, which by the articles of association has a lien on the shares of every shareholder for debts due to the bank from him either alone or jointly with any other person. A.'s shares are in fact, but not to the knowledge of the bank, partnership property. The firm of A. and B. becomes bankrupt. The bank cannot treat these shares as A.'s separate property for the purpose of its lien, and cannot prove against the joint estate for the balance due from the firm of A. and B. without deducting the value of the shares.[2]

Double proof allowed on distinct contracts.

81. "If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof[3] in respect of the contracts against

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[1] *Ex parte Dickin* (1875), 20 Eq. 767.

[2] *Ex parte Manchester and County Bank* (1876), 3 Ch. Div. 481. The reason is, according to Mellish, L.J. (at p. 487), that the question is not between the partners and the secured creditor, but between the secured creditor and the other creditors of the firm, so that the principle of estoppel does not apply. James, L.J., doubted as to the principle, and Baggallay, J.A., preferred to rest the decision on the provisions of the Bankruptcy Act as to secured creditors.

[3] The statutory right to prove carries the right to receive dividends, and is in no case merely formal: see *Ex parte Honey* (1871), 7 Ch. 178.

Chap. XI. Art. 81.

the properties respectively liable on the contracts."[1]

In cases not included in the foregoing rule a creditor to whom a firm is liable, and to whom its members are also severally liable for the same debt, must elect whether he will proceed as a creditor of the firm or as a separate creditor of the partners.[2]

Illustrations.

1. A., B., and others are partners in a firm of A. & Co. A joint and several promissory note is made and signed by A. & Co., by A. and B. separately, and by other persons. Afterwards the firm of A. & Co. becomes bankrupt. Here the contract of the firm and the separate contracts of A. and B. contained in the same note are distinct contracts within the above rule, and the holder of the note may prove against and receive dividends from both the joint estate of the firm and the separate estates of A. and B.[3]

2. A. & B. are partners. They borrow a sum of money for partnership purposes from C., and C. settles the debt upon certain trusts by a deed in which A. and B. jointly and severally covenant with D. to pay the sum. The deed does not show that A. and B. are partners or that the debt is a partnership debt. The firm becomes bankrupt. Here it may be shown by external evidence that the joint contract of A. and B. in the deed is in fact the contract of their firm, and D. may prove against the joint estate of the firm in respect of the

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[1] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. 2, Art. 18.

[2] This was the old general rule, which is now practically reduced to an exception of no great importance; Lindley, ii. 1208, 1212. The cases cited as illustrations will show that the Court is inclined to give a liberal application to the modern enactment.

[3] *Ex parte Honey* (1871), 7 Ch. 178.

joint covenant, and against the separate estates of A. and B. in respect of their several covenants.[1]

Effect of separate discharge of partner.

82. Where the discharge of any member of a partnership firm is granted to him in his separate bankruptcy, he is thereby released from the debts of the firm as well as from his separate debts.[2]

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[1] *Ex parte Stone* (1873), 8 Ch. 914.

[2] *Ex parte Hammond* (1873), 16 Eq. 614.

APPENDIX.

In 1879, at the request of Mr. Sampson Lloyd, then member for Plymouth, I drew a Bill for the consolidation and amendment of the law of partnership. The objects of this Bill were:—

1. To codify the existing law, for which the present work served as an outline.

2. To introduce a system of limited partnership corresponding to partnership *en commandite*.

3. To introduce general registration of firms.

In 1880 the Bill passed a second reading, and was in a general way approved by the Board of Trade on condition of the plan for a general registration of firms being dropped, which accordingly was done by means of amendments on a committal *pro forma:* but there was no time for further progress.

In 1882 the Bill, thus amended, was again brought in, and was referred to a Select Committee, which reported the consolidating part with amendments, but declined to proceed with the part relating to limited partnerships. The Bill went into committee of the whole house, where many further amendments were proposed, and some agreed to: but on the whole little way was made, and the Bill again dropped.

The consolidating part alone was again introduced, with the amendments formerly adopted at various stages, in the Session of 1883; but this time it did not come to a second reading, the debate standing adjourned on a Wednesday, and never being resumed: ultimately the Bill was withdrawn. In 1884 a Bill for general registration of firms, being the abandoned part of the Partnership Bill of 1879—80, with some additions and variations of detail, was separately introduced. This is the part which the original promoters of the Bill cared most for. Personally I never cared much for it, and

I now think it a mistake, though *limited* partnerships, if recognized by law, would certainly have to be registered. One or more of these Bills have, I believe, been introduced in subsequent sessions, but there has not been further debate on them in Parliament.

It is thought convenient to reprint here the consolidating Bill of 1883, with a few explanatory notes, and also the limited partnership clauses of the Bill of 1880.

These last are doubtless capable of much improvement, as the experiment of drafting provisions for the establishment of *commandite* partnership in an English form was all but untried. But, inasmuch as the matter seems as far as ever from coming to anything practical, I have not thought it worth while to give any more consideration to it at present.

PARTNERSHIPS BILL (1883).

ARRANGEMENT OF CLAUSES.

A BILL to consolidate and amend the Law of Partnerships.

BE IT ENACTED by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Partnership Act, 1883.

Commencement of Act.

2. This Act shall commence and come into force on the first day of January one thousand eight hundred and eighty-four.

Extent of Act.

3. This Act shall not extend to Scotland.

Interpretation of terms.

4. In this Act the following words and expressions are used in the following senses, unless a different intention appears from the context:

"Court" includes every Court, judge and magistrate having jurisdiction in the case.

"Business" includes any trade, occupation, or profession.

"Person" includes any body of persons corporate or unincorporate.

"Writing" includes print, and "written" includes printed.

"Land" includes hereditaments, corporeal and incorporeal, of any tenure.

Application of Act.

5. This Act shall not apply to any company or association which is—

25 & 26 Vict. c. 89.

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint-stock companies; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries.

PART I.

Of Partners, and their liability and authority in respect of Partnership Dealings.

Partnership defined.

6.—(1.) Partnership is the relation which subsists between persons who have agreed to carry on business and share profits in some way in common.[1]

Question of partnership to be decided by true intention of parties.

(2.) In deciding whether a partnership does or does not exist in any particular case, the Court shall have regard to the true contract and intention of the parties as appearing from the whole facts of the case.

Part ownership not to create partnership.

7. Joint tenancy, tenancy in common, or part ownership, shall not of itself create a partnership as to anything so held or owned, whether there is or is not a partnership between the tenants or owners as to any profits made by the use thereof.

Sharing of gross returns not to create partnership.

8. The sharing of gross returns shall not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common interest in any property from which or from the use of which the returns are derived.

Sharing profits not necessarily partnership.

9. The receipt of a share of the profits or of a payment contingent upon or varying with the profits of any business shall not of itself make the person receiving the share or payment a partner with the person carrying on the business.

Payment out of profits not to create partnership.

10. The receipt of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of any business shall not of itself make any person receiving the debt or sum a partner in the business.

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[1] The definition was altered in Committee to this form, which appears to me vague and clumsy. The words "in some way in common" add nothing to the meaning. Such language may become a judge who wishes to disclaim formal definition. It is not fit for the Legislature. Moreover it is not clear whether or not the words apply (whatever the intended effect of their application may be) to the words "carry on business" as well as to "share profits."

As to person advancing money for share of profits.

11. The advance of money by way of loan to a person engaged or about to engage in any business upon a contract in writing with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, shall not of itself constitute the lender a partner with the person or persons carrying on the business or render him responsible as such.

As to agent remunerated by share of profits.

12. A contract for the remuneration of a servant or agent of any person engaged in any business by a share of the profits of the business shall not of itself render the servant or agent responsible as a partner therein, nor give him the rights of a partner.

As to widows or children of deceased partners receiving share of profits as annuity.

13. A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, shall not by reason only of such receipt be deemed to be a partner in the business or to be subject to any liabilities incurred therein.

As to seller of goodwill receiving share of profits.

14. A person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of the business shall not by reason only of the receipt be deemed to be a partner of or be subject to the liabilities of the person carrying on the business.

Seller of goodwill receiving share of profits to be postponed to other creditors for value in case of bankruptcy, &c. of buyer.

15. In the event of any person to whom money has been advanced upon such a contract as aforesaid, or any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other

creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.[1]

What is a firm.

16. Persons who have entered into partnership with one another are called collectively a firm, and the name under which their business is carried on is called the firm-name.

Number of persons in a firm.

17. A firm may consist of any number of persons not exceeding ten where the business of the partnership is banking, and not exceeding twenty where it is any other business.[2]

Choice of firm-name.

18. Subject to all statutory and other rules of law for the protection of trade marks, trade names, and rights incident to the goodwill of any business, partners may carry on their business under any firm-name they think proper.

Revocation of continuing guaranty by change in firm.

19. A continuing guaranty given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, the guaranty was given.

Liability of partners.

20. Every partner in a firm is liable jointly with the other partners for all debts and obligations incurred while he is a partner and in the usual course of partnership business by or on behalf of the firm; and after his death his estate is also severally liable for such debts and obligations, so far as they remain unsatisfied.

Liabilities of outgoing and incoming partners.

21.—(1.) A partner who retires from a firm does not thereby cease to be liable for partnership debts contracted before his retirement.

(2.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

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[1] Clauses 11—15 are re-enactment of 25 & 26 Vict. c. 86.
[2] Companies Act, 1862, s. 4.

(3.) A retiring partner may be discharged from any existing liabilities, and an incoming partner may become subject thereto, by an agreement to that effect between the members of the firm as newly constituted and the creditors.

(4.) Such agreement as mentioned in the last sub-section may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Persons liable by "holding out."

22.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as such partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the particular person so giving credit by or with the knowledge of the apparent partner making or suffering the representation.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

Partners bound by acts on behalf of firm.

23. Acts and instruments relating to the business of the firm and done and executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, shall be binding on all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds.

Power of partner to bind the firm.

24. Subject to the provisions of this Act the acts of every partner who does any act necessary for or usually done in carrying on business of the kind carried on by the firm of which he is a member shall bind his partners to the same extent as if he were their agent duly appointed for that purpose; unless the partner so acting has in fact no authority

to act for the firm in the particular matter, and the person with whom he is dealing

(*a.*) knows that he has no authority, or

(*b.*) does not know him to be a partner.

Special powers of partners.

25. Subject to the provisions of the last section, every partner may bind the firm by any of the following acts:

(*a.*) He may sell any goods or personal chattels of the firm.

(*b.*) He may purchase on account of the firm any goods of a kind necessary for or usually employed in the business carried on by it.

(*c.*) He may receive payment of debts due to the firm, and give receipts or releases for them.

(*d.*) He may hire and engage servants and agents for any purposes of the partnership business for which servants or agents are necessarily or usually employed.

(*e.*) He may draw cheques on the bankers of the firm in the firm-name.

Special powers of partners in certain firms.

26. In addition to the powers mentioned in the last foregoing section, and subject as therein mentioned, every member of a partnership carrying on business of a kind in which any of the following acts is usually done, may bind the firm by the same respectively:

(*a.*) He may draw, accept, indorse, make, and issue bills and other negotiable instruments in the name of the firm.

(*b.*) He may borrow money on the credit of the firm.

(*c.*) He may for the purpose of such borrowing or of securing an existing debt pledge any goods or personal chattels belonging to the firm.

(*d.*) He may for the like purposes make an equitable mortgage by deposit of deeds or otherwise of real estate or chattels real belonging to the firm.[1]

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[1] On the last revision of the Bill this clause was framed as it now stands, in order to get rid of the formal distinction between trading and other partnerships. And now that the enumeration of "traders" has disappeared from the Bankruptcy Act of 1883, the amendment would be not only convenient but necessary. Yet an unwary reader might infer that it is always an open question of fact what is usual in the particular business, which is not the case.

Partner using credit of firm for private purposes.

27. Where one partner pledges the credit of the firm for a purpose apparently not connected with the partnership affairs, the firm shall not be bound, unless he is in fact specially authorised by the other partners; but this section shall not affect any liability which may arise from any other partner having so conducted himself as to give reasonable ground to the party dealing with the partner first mentioned for believing him to be so authorized.

Effect of notification that firm will not be bound by acts of partner.

28. All or any of the partners in a firm may give notice that the firm will not be bound by acts, or by some class of acts, done in the name of the firm by any one or more of the partners; and if the partner or partners last aforesaid deal in the name of the firm in any matter comprised in the notice with any person to whose knowledge the notice has come, that dealing shall not be binding on the firm.

Admissions and representations of partners.

29. An admission made by any partner concerning the partnership affairs shall be relevant against the firm, and a representation made by any partner to any person concerning the partnership affairs shall have the same effect as against the firm, and so far as concerns the civil rights and liabilities of the partners, as if it had been made by all the partners: provided that this section shall not apply to a representation made by one partner as to the extent of his own authority to bind the firm.

Notice to acting partners to be notice to the firm.

30. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs shall be deemed to be notice to the firm, except in the case of a fraud upon the firm committed by or with the consent of that partner.

Liability for wrongs joint and several.

31. Every partner shall be liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two next following sections.

Liability of the firm for wrongs.

32. Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, loss

or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm.

33.—(1.) Where any money or property of a third person is received by one partner, acting within the scope of his real or apparent authority in the partnership affairs, and is misapplied by that partner, and where any money or property of a third person being as such in the custody of the firm is misapplied by any partner, the firm shall be liable to make good the loss.

(2.) For the purposes of this section money shall be deemed to be in the custody of the firm when it has been paid to any agent of the firm, or paid or credited to the account of the firm with any person, in the ordinary course of business, or under such circumstances that a partner using ordinary diligence in the partnership affairs would be aware of the payment or transaction.

Improper employment of trust property for partnership purposes.

34. If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner shall be liable for the trust property to the persons beneficially interested therein unless he

(*a.*) Knew of the breach of trust, or

(*b.*) With reasonable diligence might have known it.

In either of the last-mentioned cases the partner or partners having such knowledge or means of knowledge as aforesaid shall be liable for the breach of trust as if he or they had been a trustee or trustees of the misapplied trust property, and jointly and severally if more than one.

PART II.

The relations of Partners to one another.

Terms of partnership may be varied only by consent of all partners.

35. Where the mutual rights and duties of partners have been determined by a special contract between them, the contract may be rescinded or varied by the consent of all the partners.

The consent required by this section may either be express or inferred from a habitual course of dealing.

Partnership property.

36.—(1.) The partners in any firm are tenants or owners in common of all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business. Such property, rights, and interests are called in this Act partnership property.

(2.) Provided that the legal estate or interest in any land which is partnership property shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased shall belong to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as held by them in the land first mentioned at the date of the said purchase.

Property bought with partnership money.

37. Unless a contrary intention appears by express agreement or by the nature of the transaction, property bought with money belonging to the firm shall be deemed to have been bought on account of the firm.

Conversion into personal estate for some purposes of land held as partnership property.

38. Where land has become partnership property, it shall be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate, unless a contrary intention appears either by express agreement or by the conduct of the partners.

Conversion of joint into separate estate, or conversely, by agreement of partners.

39. Partners may at any time by agreement between themselves convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property.

Such conversion, if made in good faith, shall take effect

not only as between the partners, but as against the creditors of the firm and of the several partners.

Provided that if the firm or any partner whose separate estate is affected by any agreement for conversion becomes bankrupt or is insolvent after the agreement is made and before it is completely executed, the property shall not be converted.

What is a partner's share.

40. The share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged.

Procedure against partnership property for a partner's separate judgment debt.

41.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except upon a judgment against the firm.

(2.) The High Court of Justice, or a judge thereof, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's share in the partnership assets with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order direct all accounts and inquiries necessary or proper for ascertaining the value of the share so charged, and give all other orders and directions (including, if necessary, an order for dissolving the partnership and all directions incidental thereto) which might have been given if the charge had been made in favour of the judgment creditor by the partner.

(3.) A summons under this section shall be served on all the partners.

(4.) Provided that every order for sale or foreclosure made under this section shall include liberty for the other partner or partners to purchase or redeem the charged share.

(5.) For the purposes of this section, the terms "firm" and "partners" shall include every unincorporated company and association formed for purposes of gain, and the members thereof; and "writ of execution" shall include writs of fieri facias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto.

Rules as to interests and duties of partners subject to special agreement.

42. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement between the partners, by the following rules:

Presumed equality of shares.

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the partnership:

Right of partners to indemnity and contribution.

(2.) The firm must indemnify every partner for and against payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm; or,

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm; and as to actual payments or advances, with interest at the rate of five per cent. per annum from the date of the payment or advance:

Right of partners to take part in business.

(3.) Every partner may take part in the management of the partnership business:

Duty of gratuitous diligence in partnership business.

(4.) Every partner must attend diligently to the business of the partnership, and shall not be entitled to any remuneration for acting in such business:

Power of majority to decide differences.

(5.) All differences which arise as to matters in the ordinary course of the partnership business shall be decided by a majority of the partners; provided that the decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority, and that every partner must have an opportunity of being heard in the matter.

This proviso extends to powers conferred on a majority of the partners by express agreement:

Admission of new partners.

(6.) No person may be introduced as a partner without the consent of all existing partners:

Change in nature or place of business.

(7.) No change may be made in the conduct or regulation of the partnership affairs without the consent or authority of a majority of the partners, and no change may be made in the nature of the partnership business or the place where it is carried on without the consent of all existing partners:

(8.) The partnership books shall be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may have access to them, and may inspect and transcribe the same, or any of them, when he thinks proper. Custody and inspection of partnership books.

43. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. Partner cannot be expelled unless under express power.

Where such power is conferred, it may be exercised only in good faith with a view to the benefit of the firm, and the partner whom it is sought to expel must have an opportunity of being heard.

44. Where a partnership has been entered into for a fixed term, no partner can retire from it during that term, except with the consent of all the partners, or in the exercise of an option previously conferred by express agreement. Retirement from partnership for a term only by consent.

45. Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time upon giving express notice of his intention so to do to all the other partners. Retirement from partnership at will.

Where the partnership has originally been constituted by deed, a notice in writing, and signed by the partner giving it, shall be sufficient for this purpose.

46. Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners shall remain the same as they were at the expiration of the term, so far as consistent with the right of any partner to determine the partnership at will. Where partnership for term is continued over, continuance on old terms presumed.

A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, shall be presumed to be a continuance of the partnership.

47. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just Partners must act for common advantage.

and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Partners must not make private gain by partnership transactions or by means of partnership connection.

48. Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection.

This section shall apply to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Partner must not compete with firm.

49. If a partner, without the consent of the other partners, carries on any business competing or interfering with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

PART III.

The Dissolution of Partnerships, and its consequences.

Dissolution by expiration or notice.

50. A partnership shall be dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership shall be dissolved as from the date of the communication of the notice.

Dissolution by bankruptcy, death, &c.

51. Subject to any agreement between the partners, every partnership shall be dissolved by any of the following events:

(*a.*) The alienation of any partner's share by bankruptcy or otherwise by operation of law:

(*b.*) The death of any partner:

(*c.*) In the case of a partnership not for a fixed term, if any partner assigns or incumbers his interest in the partnership property or profits.

Dissolution by illegality of partnership.

52. A partnership shall in every case be dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

Dissolution by the Court.

53. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When an acting partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend as by any other partner:

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(*c.*) When a partner, other than the partner suing, is convicted of any crime or becomes liable to a criminal prosecution:

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(*e.*) When a partner, other than the partner suing, assigns or incumbers his interest in the property or profits of the firm:

(*f.*) When the business of the partnership can only be carried on at a loss:

(*g.*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Rights of creditors against apparent members of firm.

54. The rights of a creditor of a firm against its apparent members shall not be affected by any dissolution or change in the firm of which the creditor had not notice.

An advertisement in the London Gazette as to a firm whose principal place of business is in England, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be deemed to be notice as to creditors who were not in fact customers of the firm before the date of the dissolution or change so advertised.

Provided that the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the creditor to be a partner, retires from the firm, shall not be liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Right of partners to notify dissolution.

55. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Continuing authority of partners for purposes of winding-up.

56. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, shall continue notwithstanding the dissolution so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm shall in no case be bound by the acts of a bankrupt partner, but this proviso shall not affect the liability of any person who has represented himself or knowingly suffered himself to be represented as a partner.

Rights of partners as to application of partnership property.

57. On the dissolution of a partnership every partner shall be entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for

that purpose any partner or his representatives may upon the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

Sale of goodwill on dissolution.

58. On the dissolution of a partnership, every partner shall be entitled, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners.

Right of partners to restrain use of partnership name.

59. After a dissolution, every partner in the dissolved firm or his representatives may, in the absence of any agreement to the contrary, restrain any other partner or his representative from carrying on the same business under the firm-name until the affairs of the firm have been wound up, and the partnership property disposed of.

Peculiar rights in special cases of dissolution: Apportionment of premium in certain cases where partnership prematurely dissolved.

60.—(1.) Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such proportionate part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Lien on assets where partnership dissolved for fraud.

(2.) Where a partnership contract is rescinded on the ground of the fraud of one of the parties thereto, the defrauded party shall be entitled to a lien on the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of an interest in the partnership property, and shall also be entitled to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities.

Right of outgoing partner in certain cases to share profits made after dissolution.

61.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partner or partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, there, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his capital or assets, or to the amount of his capital or assets with interest thereon at five per cent. per annum.

(2.) In determining how far the profits made since the dissolution are attributable to the outgoing partner's capital, the Court shall have regard to the nature of the business, the amount of capital from time to time employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally.

Exercise of option to purchase outgoing partner's share.

62. Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, shall not be entitled to any further or other share of profits; but if any partner assuming to act in exercise of the aforesaid option does not in all material respects comply with the terms thereof, he shall be liable to account for subsequent profits under the last preceding section.

Retiring or deceased partner's share to be a debt.

63. The amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share shall, subject to any agreement between the partners, be a simple contract debt accruing at the date of the dissolution or death.

Rule for distribution of assets on final settlement of accounts.

64. In settling accounts between the partners after a dissolution of partnership, the following rules shall be observed (subject as to the payments to partners to any agreement):

(*a.*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b.*) The assets of the firm, including the sums[1] contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3. In paying to each partner rateably what is due from the firm to him in respect of capital:

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

PART IV.

Repeal.

65. Upon and from the commencement of this Act— Repeal of 28 & 29 Vict. c. 86, and 19 & 20 Vict. c. 97, s. 4.

(1.) The whole of an Act of the session of the twenty-eighth and twenty-ninth years of her Majesty, chapter eighty-six, intituled "An Act to amend the law of Partnership;"

(2.) Section four of the Mercantile Law Amendment Act, 1856, shall be repealed in so far as the said enactments respectively are applicable to England and Ireland, but without prejudice to any agreement made or any right acquired or liability incurred before the commencement of this Act.

The limited partnership clauses of the Bill of 1880 (not proceeded with by the Select Committee in 1882) were as follows:—

PART IV.

Of Limited Partnerships.[2]

64.—(1.) A limited partnership is a firm containing one or more limited partners as hereinafter defined. Definition of limited partnership.

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[1] This, of course, ought to be "any sums," or "the sums, if any."

[2] Compare Code de Commerce, Book 1, Title 3; Allgem. Deutsches

(2.) A limited partner is a partner whose liability for the debts and obligations of the firm is limited to a certain amount which he has contributed or undertaken to contribute to the partnership property.

(3.) From and after the commencement of this Act limited partnerships may be formed in the manner and subject to the conditions by this Act provided and declared.

Constitution and registration.

65. A limited partnership must contain one or more general partners, and must be registered under this Act. Its firm-name must not contain the name of any limited partner.

Limited partnership not properly registered to be general.

66. If a partnership is not registered under this Act every partner therein shall be deemed to be a general partner.

Limited partner not entitled to take part in the business.

67. A limited partner shall have no right to take part in the management of the partnership business except as an agent or servant of the firm under an express authority from the general partner or partners; and he shall have no authority to bind the firm save by acts done in the course of such agency or service as aforesaid.

Limited partner not entitled to vote in ordinary partnership affairs.

68. A limited partner shall not be entitled to a voice or vote in the decision of matters relating to the ordinary course of the partnership business; but no change in the nature or principal place of the business or in the firm-name may be made without his consent.

Introduction of new partners.

69. The consent of the limited partner or partners, or a majority of them if more than one, shall be needful for the introduction into the firm of any new general partner, but not of any new limited partner.

Limited partner may deal with firm, &c., with consent of general partners.

70. The consent of the general partner or partners only shall be required to exempt a limited partner from liability

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Handelsgesetzbuch, Book 2, Title 2, "Von der Kommanditgesellschaft;" and Title 25 of the Swiss Federal Code of Obligations. American statutes on the subject may be seen in Troubat's work on Limited Partnership. (The Law of Commandatary and Limited Partnership in the United States. By Francis J. Troubat. Philadelphia, 1853.)

to account to the firm for any benefit derived by him from a transaction concerning the partnership.

Limited partner may compete with the firm.

71. A limited partner, unless employed as an agent or servant of the firm or restrained by express agreement with the general partner or partners, shall not be bound to abstain from exercising upon his own account any business competing or interfering with the business of the firm.

Duration of limited partnership.

72.—(1.) Every limited partnership must be entered into for a fixed term, and may not be dissolved by agreement of the partners before the expiration of that term unless all the partnership debts are paid, or unless all the unpaid creditors of the firm consent to the dissolution.

(2.) The dissolution of a limited partnership contrary to this section shall render the limited partners liable as general partners for all existing debts of the firm.

Death, bankruptcy, &c., of limited partner not to dissolve the firm.

73. The death of a limited partner, or the alienation of his interest in the partnership by the operation of law, shall not dissolve the partnership as between the surviving or continuing partners.

General partners only liable to bankruptcy for partnership debts.

74. The general partner or partners only of a limited partnership shall be liable to be made bankrupt in respect of the dealings or liabilities of such partnership.

The term "general partners" for the purposes of this section includes a limited partner who has become liable as a general partner under any provision of this Act.

Contributions of limited partners.

75. When and so soon as a limited partnership has been duly registered, and after the expiration of the time, if any, upon the expiration of which the contribution of any limited partner or any part thereof is payable, his contribution or such part thereof as aforesaid, or such part thereof respectively as for the time being remains unpaid, shall become and be a debt to the firm, and any limited partner making default in payment thereof respectively at the proper time may be sued therefor in the name of the firm by the general partner or partners.

Limited partner's share not to be paid out to him during term.

76. A limited partner shall not during the continuance of the partnership draw out or receive back any part of his contribution under the name of interest, profits, or otherwise howsoever.

Limited partner not to receive profits or interest while capital diminished.

77. If at any time when the partnership capital is diminished below the amount contributed by the limited partner or partners, any limited partner receives interest or profits on his share, he shall be liable as a general partner for all partnership debts contracted in the time during which the partnership capital has been so diminished as aforesaid: Provided that nothing in this section shall bind a limited partner to repay any interest or share of profits received by him on the footing of an annual or other regular account made and acted upon in good faith and with reasonable belief in its accuracy.

General provisions of Act to apply where not excluded by this part.

78.—(1.) Every limited partner shall be liable for the debts and obligations of the firm in like manner as a general partner, except so far as his liability is limited or varied by this Act.

(2.) The rights and duties of the members of a limited partnership towards one another shall be determined by the provisions of Part Two of this Act, and the manner and consequences of the dissolution of a limited partnership by the provisions of Part Three of this Act, so far as the nature of the case admits, and the said provisions are not as regards limited partners excluded or varied by this Act.

Manner and particulars of registration.

79. Registration of a limited partnership under this Act shall be effected by sending by post or delivering to the registrar a statement in writing containing the following particulars:—

(*a.*) The firm name.
(*b.*) The nature of the business.
(*c.*) The place or places of the business.
(*d.*) The full name, usual residence, and other occupation, if any, of each partner.
(*e.*) The term for which the partnership is entered into.

(*f.*) A statement that the partnership is limited and the description of every limited partner as such.

(*g.*) The sum contributed or to be contributed by each limited partner, and whether paid or to be paid in cash, or how otherwise.

(*h.*) The amount already paid up in respect of such contribution, and the date or dates at which the residue, if any, is payable.

The statement shall be signed by each partner in the presence of a witness.

The registration shall be subject to the same conditions as to payment of fees and otherwise as if the partnership were a company under the Companies Acts not having a capital divided into shares.

Re-registration of limited partnership on renewal.

80.—(1.) A limited partnership renewed or continued by agreement of the partners after the expiration of the registered term shall be registered as if it were a new firm.

(2.) For the purpose of registration any capital of a limited partner remaining in the business shall be deemed to be contributed by him to the new firm, and may be reckoned as or towards his contribution.

Registration of changes in firm.

81. If a change occurs in the constitution of a limited partnership, the members of the firm as re-constituted shall, within one month, notify the change to the registrar by a statement sent by post or delivered to him.

Re-registration on change of firm-name.

82. If the firm-name of a limited partnership is changed it shall be registered as if it were a new firm, and the statement sent or delivered to the registrar shall mention the former name of the firm as being abandoned by it, as well as the particulars required for a new registration.

Forms.

83. For the purpose of making the statements required by this Act, the forms in the second Schedule to this Act[1] or forms to the like effect may be used, and if used shall be sufficient.

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[1] The first Schedule, as the Bill then stood, was a description of "traders" copied from the Bankruptcy Act of 1869. See note on p. 169 above.

SECOND SCHEDULE.

Forms of Statement.

A. On Registration of Limited Partnership.

The firm-name is .

The business of the firm is .

It is intended to carry on the business at .

The term of the partnership is years from the day of 18 . The partnership is limited. The limited partners are the undersigned A. B. and C. D.

The particulars of the contributions of the limited partners are as follows:

Names of limited partners.	Amount of contribution and whether payable in cash or how otherwise.	Amount paid up.	When residue payable.

We the undersigned desire to constitute a limited partnership in accordance with the above particulars:

Names,	Addresses,	and Descriptions of Subscribers.
1. John Jones, of	&c.,	merchant.
2. John Smith, of	&c.,	carpenter.
3. Thomas Green, of	&c.,	grocer.

Dated the day of 18 .

Witness to the above signatures,

Samuel Weller,

10, North Street, Westminster.

B. Notice of change in constitution of limited partnership.

Registered firm-name & Co.

We the undersigned [*the members of the limited partnership as reconstituted*] hereby give notice that on the day of 18 , the following change took place in the constitution of the limited partnership registered by the name of & Co., that is to say:

* A. B. retired from the firm.
* C. D. became a member of the firm.

* As the case may be.

Description of New Member. †

† As upon an original registration.

Full name.	Usual residence.	Other occupation, description, and additions, if any.

(Signed)

C. Notice of change of registered Firm-name.

(*In addition to Form A.*)

Registered firm-name & Co.

The persons now registering are the persons who heretofore carried on business under the registered firm-name of & Co., which is abandoned as from the date of this notice.

INDEX.

The figures in thick type refer to the numbers of the Articles in the text.

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